



CITY OF CINCINNATI

DISPARITY STUDY

FINAL REPORT

October 7, 2002

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I. LEGAL ANALYSIS

A. THE LEGAL ENVIRONMENT—An Overview

The City of Cincinnati has undertaken a review of its more recent contracting and procurement activities, examining in particular its progress towards the utilization of willing and capable minority and women business owners in its contracting and procurement. The City of Cincinnati seeks to attain a diverse and equitable business environment that is beneficial to all of its citizens. The purpose of this study is to investigate whether a disparity exists in the City of Cincinnati contracting and procurement through a quantitative analysis, and to undertake an examination of whether minority and women owned businesses enjoy equal opportunities to do business with the City.

It is now well established that state and local initiatives that seek to employ "race conscious" measures of ensuring equal opportunity must satisfy the most exacting standards, in order to comply with prevailing interpretations of constitutional requirements. These standards were applied and closely examined by the Supreme Court in City of Richmond v. J.A. Croson Company, 488 U.S. 469 (1989), 709 S.Ct. 706, and their applicability extended in Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 115 S.Ct. 2097 (1995). The Croson decision represents the definitive legal precedent that established "strict scrutiny" as the standard of review by which state and local programs that grant or limit government opportunities on the basis of race are evaluated. The Adarand decision subsequently extended the "strict scrutiny" standard of review to race conscious programs enacted by the federal government.

In rendering the Croson decision in January 1989, the U.S. Supreme Court held that the City of Richmond, Virginia's minority business enterprise ordinance violated the equal protection clause of the Fourteenth Amendment to the United States Constitution. The ordinance mandated that majority-owned prime contractors hired by the City of Richmond subcontract 30%

of their construction dollars to minority owned subcontractors. In a six-to-three majority decision, the Court held that state and local programs which allocate, or "set aside," a portion of public contracting dollars exclusively to minority-owned businesses must meet a "strict scrutiny" standard of review if race, a constitutionally suspect classification, is considered.

The strict scrutiny test requires that race or ethnicity conscious programs be based upon a compelling governmental interest and that they be narrowly tailored to achieve that interest. See also Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County, 122F.3d895 (11th Circuit 1997), Associated General Contractors v. Drabik, 214 F.3d (6th Circuit 2000). The strict scrutiny test further requires a "searching judicial inquiry into the justification " for the preferences in order to determine whether the classifications are remedial or "in fact motivated by illegitimate notions of racial inferiority or simple racial politics".¹

It is important to note that the "strict scrutiny" standard of review represents the highest level of judicial scrutiny, and is used to test the legality of any city or state program which considers race as a determining factor. As will be further discussed herein, some lower courts, in subsequent decisions, have applied an "intermediate" level of scrutiny to state and local programs that use gender as a determining factor, and are designed for the purpose of assisting women-owned businesses.

After taking a closer look at the Croson decision, this Legal Analysis will examine later decisions of the U. S. Supreme Court, courts of appeal, and federal district courts, particularly as they relate to data collection and other evidentiary requirements. This analysis will also distinguish the extent to which Croson's requirements have been judicially modified or explained by later decisions and the impact of those decisions. After reviewing the standards and requirements that jurisdictions such as the City of Cincinnati must consider before enacting a race or gender conscious program, this analysis will conclude with a discussion of remedial options as a prelude to the substantive findings of the quantitative and qualitative research conducted for this disparity study.

¹ City of Richmond v. J. A. Croson, 488 U.S. 469, 493 (1989)

B. The CROSON DECISION—An In-depth Look

While other court decisions have influenced the enactment of minority and female business enterprise programs and will continue to do so for the foreseeable future, few have had the type of far-reaching impact that the Croson decision has had on city, state and local government contracting. While the case does not address all of the questions posed in connection with enactment of race-based affirmative action programs and does not provide any significant guidance on addressing gender-conscious public contracting, it is still essential that government entities contemplating the need for such programs are well-versed in the substance of the Croson decision. This look at the decision is in no way intended as a substitute for reading the case in its entirety. Nevertheless, the discussion below is intended to impart sufficient information to aid the uninitiated, as well as the practitioner with an understanding and overview of this disparity study's methodology and to illuminate the findings and recommendations resulting therefrom.

In 1983, the City of Richmond, Virginia adopted a Minority Business Utilization Plan (hereinafter “the Richmond Plan” or “Richmond Program”) that required prime contractors awarded City construction contracts to subcontract at least 30% of the dollar amount of each such contract to Minority Business Enterprises (hereinafter “MBEs”). To qualify as MBEs, firms had to be at least 51% owned and controlled by racial or ethnic minorities. According to evidence presented to the Court, the Richmond Plan was devised as a remedial measure intended to address the fact that, although the City of Richmond had a 50% African American population, only .67% of its prime construction contracts had been awarded to minority businesses in recent history and that the local contractors' associations had few, if any, MBE members.

The J.A. Croson Company, (hereinafter “Croson”), a white-owned mechanical, plumbing, and heating contractor, submitted a bid to provide and install plumbing fixtures at the city jail. Although the only bidder, Croson's bid did not contain the required 30% MBE participation because, according to Croson's regional manager, of the five or six potential MBE suppliers contacted, none expressed an interest in quoting until inquiries were again made on the day bids were due. On or around the bid date, one MBE indicated a desire to participate on the project, but was unable to obtain a price quotation or credit with which to acquire the supplies. Croson requested a waiver of the 30% MBE subcontract requirement on the grounds that the one

interested MBE was “unqualified” and the others contacted were unresponsive. In the meantime, the interested MBE received a quote from a fixture manufacturer that enabled the MBE to submit a quote to Croson. Inclusion of the MBE at the price quoted would have increased Croson’s \$126,000.00 bid by over \$7,500.00.

Croson’s waiver request was denied by the City of Richmond, as was its request that the City increase the overall contract price. Accordingly, after an exchange of written communication between the City of Richmond and Croson’s attorney, Croson sued the City of Richmond in the Federal Court for the Eastern District of Virginia, alleging that the City’s ordinance was an unconstitutional violation of 42 U.S.C. §1983. The District Court ruled in favor of the City of Richmond and, on appeal, a divided panel of the Fourth Circuit U. S. Court of Appeals affirmed the decision.² Both courts considered the actions of the City of Richmond in enacting the ordinance reasonable to redress past discrimination in view of the City’s findings of discrimination in the construction industry and statistical disparity in the letting of prime contracts by the City.

Croson appealed to the U. S. Supreme Court, which vacated the opinion of the Court of Appeals and remanded the case for consideration in light of the Supreme Court’s decision in Wygant v. Jackson Board of Education, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986). On remand, the Court of Appeals determined that the Richmond Plan violated both requirements for strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment, in that the statistics comparing the minority population to the percentage of prime contracts awarded to minority firms were not probative in establishing discrimination to support a compelling governmental interest; nor was the use of the 30% set-aside on the basis of race narrowly tailored to remedy the situation, had discrimination been sufficiently proved.³

In affirming the decision of the Court of Appeals, the Supreme Court concurred that the City of Richmond’s MBE program failed to satisfy both prongs of the strict scrutiny standard.⁴ The majority opinion, authored by Justice Sandra Day O’Connor, determined that Richmond failed to show that its minority set-aside program was necessary to remedy the effects of

² 779 F.2d 181 (1985)

³ J.A. Croson Co. v. City of Richmond, 822 F.2d 1355 (CA4 1987).

⁴ City of Richmond v. J. A. Croson Co., 488 U.S. at 469, 505, 509 (1989)

discrimination in the marketplace in large part because Richmond had not demonstrated the existence of the necessary discrimination, nor the relevance of its chosen remedy to redress said discrimination. The Court reasoned that a mere statistical disparity between the overall minority population in Richmond and awards of prime contracts to minority-owned firms was an irrelevant statistical comparison and insufficient to raise an inference of discrimination. Regarding the evidence that Richmond provided to support its program, the Court emphasized the distinction between "societal discrimination", which it found an inappropriate and inadequate basis for social race-conscious classification, and the type of identified discrimination that is sufficient to support and define the scope of race-based relief. The Court also noted that a generalized assertion that there had been past discrimination in an entire industry provided no guidance in determining the present scope of the injury the City of Richmond sought to remedy. The Court emphasized, "There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." ⁵ In short, the Court concluded there was no *prima facie* case of a constitutional or statutory violation by anyone in the construction industry.

As for the type of evidence that might indicate a proper statistical comparison, Justice O'Connor wrote, "Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise". ⁶ In other words, the statistical comparison would be one between the percentage of MBEs in the market qualified to do contracting work (including prime contractors and subcontractors) and the percentage of total City contracting dollars awarded to minority firms. The relevant question among lower federal courts, however, has been how to determine this particular comparison. (See discussion of statistical comparison, *infra* at pp 18-24).

Additionally, the Court stated that anecdotal accounts of past discrimination could also provide the basis to establish a compelling interest for local governments to enact race-conscious remedies, although conclusory claims of discrimination by City officials would not suffice.

⁵ Id at 480.

⁶ Id at 509

Further, the Court held that Richmond's MBE program was not remedial in nature because it provided preferential treatment to minorities such as Eskimos and Aleuts, groups for which there was no evidence of discrimination in Richmond. In order to uphold a race or ethnicity based program, there must be a determination that a strong basis in evidence exists to support the conclusion that the remedial use of race is necessary. In guiding on this point, the Court was clear that such a strong basis in evidence cannot rest on an amorphous claim of societal discrimination, on simple legislative assurances of good intention or on congressional findings of discrimination in the national economy.

As for the second prong of the strict scrutiny test, the Court ruled that Richmond's MBE program was not narrowly tailored to redress the effects of discrimination. Four distinct considerations characterize the Court's analysis of Richmond's effectiveness in narrowly tailoring its program. First, by extending the program to a long list of ethnic minorities (e.g. Aleuts) for which Richmond had established no evidence of discrimination, the scope of the program was too broad. Second, the Court viewed the thirty percent (30%) goal for MBE participation in the Richmond program as a rigid quota not related to identified discrimination. Specifically, the City was criticized for its lack of inquiry into whether a particular minority business, seeking racial preferences, had suffered from the effects of past discrimination. Third, the Court expressed disappointment that Richmond failed to consider race-neutral alternatives to remedy the under-representation of minorities in contract awards. Finally, the Richmond MBE program contained no sunset provisions that would allow for a periodic review process in order to assess the continued need for the program.

In view of the position taken by the Court in Croson, states, municipalities, and other local governments must satisfy the narrow tailoring prong, and in doing so, the following factors must be analyzed:

- Whether the MBE program covers minorities or women for which there is evidence of discrimination (i.e. statistical disparity, anecdotal evidence, etc.),
- Whether the size of the MBE participation goal is flexible and contains waiver provisions for prime contractors who make a "good faith" effort to satisfy MBE

utilization goals, but are unsuccessful in finding any qualified, willing and able MBEs;

- Whether there is a reasonable relationship between the numerical goals set and the relevant labor pool of MBEs capable of performing the work in the marketplace;
- Whether race-neutral alternatives were considered before race-conscious remedies were enacted; and
- Whether the MBE program contains sunset provisions or other mechanisms for periodic review to assess the program's continued need.

C. WITHSTANDING LEGAL CHALLENGE – Procedural Posture, Permissible Evidence and Burdens of Proof

This section is a review of the methodology upon which courts rely in reviewing legal challenges to M/WFBE programs. First, is a discussion of the standing requirements for a plaintiff to maintain a suit against a M/WFBE program; secondly, a discussion of the standard of review of equal protection that governs the courts' analyses; thirdly, a review of the evidentiary requirements courts utilize to determine proof of discrimination; and lastly, the burden of production and proof the courts require of the parties in these cases. Put another way, this section examines who can challenge M/WFBE programs once enacted, the types of evidence that must be offered by the parties, and the responsibilities the parties must shoulder in meeting their burdens of proof.

1. The Standing Requirement

As a result of the Croson decision, numerous legal challenges to MBE set-aside programs have come before the courts, including the flurry of challenges to state and local affirmative action programs. *Standing* is important because it is pivotal in determining a party's relevance in a lawsuit. If an MBE program is properly constructed and administered, there should be no legitimate claims of reverse discrimination by majority contractors that could result in a lawsuit. Under the traditional standing analysis, it must be ascertained that there has been an "injury in fact" and plaintiffs must establish a causal connection between the injury, the ordinance, and the

likelihood that the injury will be redressed by a favorable decision. Moreover, the courts may not tolerate a lawsuit unless the plaintiff shows some "concrete and particularized" injury that is in fact imminent, and which amounts to something more than "conjectural or hypothetical" injury.⁷

The traditional standing requirement for contractors challenging local and state government minority preference plans was modified by the Supreme Court's decision in Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Florida, et al., 508 U.S. 656, 113 S.Ct. 2297, (1993). In that opinion, which was written by Justice Clarence Thomas, the Court relaxed the injury in fact requirement by holding that, as long as the non-minority contractors can show that they were "able and qualified to bid" on a contract subject to the City's ordinance, the "injury in fact" arises from an inability to compete with MBEs on an equal footing.⁸ Specifically, the Court stated:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract. To establish standing, therefore, a party challenging a set-aside program...need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.⁹

More recently, in Associated General Contractors of America v. City of Columbus, 172 F.3d 411 (6th Cir. 1999) the United States Court of Appeals for the Sixth Circuit also addressed the injury in fact element of the standing requirement. In Associated General Contractors, a contractors association brought an action challenging the constitutionality of the City of

⁷ See Cone Corp. v. Hillsborough County, 1994 WL 371368; Cone Corp., 1994 WL 526019 (M.D. Fla. 1994) (Court imposed Rule 11 sanctions based on plaintiffs' complaint which failed to establish injury in fact). See also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

⁸ See Contractors Assn. of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 990, 995 (3rd Cir. 1993); Concrete Works of Colorado v. City and County of Denver, 36 F.3d 1513, 1518 (10th Cir. 1994); (concrete works submitted and the ordinance prevented it from competing on an equal basis.); Webster Greenthumb v. Fulton County, 51 F.Supp. 2d 1354 (Plaintiff Greenthumb demonstrated that it was able to bid on contracts and a discriminatory policy prevented it.)

⁹ 508 U.S. at 666.

Columbus' minority business set aside ordinance. The Federal District Court for the Southern District of Ohio struck down the ordinance and the City moved for relief from judgment, *inter alia*, after enacting a new set-aside ordinance. The Court of Appeals held, in pertinent part, that the contractors association could not demonstrate the injury in fact required to establish standing to challenge the constitutionality of the second minority business set-aside ordinance that was enacted by the City, but had not yet been put into effect. The Court further stated that any injury foreseen as a result of the ordinance could not be other than hypothetical or conjectural until the ordinance was put into effect. As explained by the Court:

Once the set-aside program was gone, the constitutional violation was gone, and no condition-requiring repair remained. The remedy was complete. The agreed order, however...enjoined the City from enacting any new set-aside legislation without first obtaining district court approval--thus, the decree aimed at eliminating a condition that did not yet exist, a condition that, at most, might violate the Constitution, if that condition should in fact materialize.¹⁰

Lastly, in Adarand, the Supreme Court demonstrated that it would continue to find standing in cases in which the challenging party makes "an adequate showing that sometime in the relatively near future it will bid on another government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors."¹¹ In other words, if the challenging party is very likely to bid on future contracts, and must compete for such contracts against MBEs, then that contractor has standing to bring a lawsuit.

2. Equal Protection Clause Standards

The Fourteenth Amendment to the U. S. Constitution provides, in part, that "No state shall... deny to any person within its jurisdiction the equal protection of the laws."¹² The second preliminary matter that courts address is the standard of equal protection review that governs their analysis.

¹⁰ 172 F.3d at 418.

¹¹ Adarand, 515 U.S. 200, 211, 115 S.Ct. 2097, 2105.

¹² U.S. Const. amend. XIV, § 1.

a. Judicial Standards of Review

Courts determine the appropriate standard of equal protection review by examining the protected classes embodied in the statute. The courts apply *strict scrutiny* to review an ordinance's race-based preference scheme and inquire whether the law is narrowly tailored to achieve a compelling governmental interest. Gender-based classifications, on the other hand, are evaluated under the *intermediate scrutiny* rubric, which provides that the statute must be substantially related to an important governmental objective.¹³ Race-conscious affirmative action, therefore, is subject to a much higher standard of judicial review than gender-conscious affirmative action.

(1) Strict Scrutiny

Croson and its progeny have now established in case law that, in order for a local governmental entity to constitutionally enact an MBE ordinance that awards contracts, it must show a *compelling governmental interest*. This compelling interest must be proven by demonstrating particularized findings of past discrimination. The strict scrutiny test ensures that the means used to address the compelling goal of remedying past discrimination "fit" so closely that there is little likelihood that the motive for the racial classification is illegitimate racial prejudice or stereotype.¹⁴ After legislative or administrative findings of constitutional or statutory violations, governments have a compelling interest in remedying past discrimination.

It is now widely accepted in case law that general societal discrimination is not a compelling interest that justifies the use of race-based measures.¹⁵ Rather, there must be some showing of prior discrimination by the governmental actor involved, either as an active or passive participant.¹⁶ The governmental entity must identify discrimination in the area, and in the industry to which the plan applies. A *prima facie* case of intentional discrimination is deemed sufficient to support a local government's affirmative action plan; however, it is not acceptable to

¹³ Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724, 102 S.Ct. 3331, 3335. See Engineering Contractors Association of South Florida, Inc., et al v. Metropolitan Dade County, et al, 122 F.3d 895 (11th Cir. 1997) (Eleventh Circuit explaining U.S. v. Virginia, and the appropriate gender-based affirmative action equal protection analysis).

¹⁴ Croson, 488 U.S. 469, 493, 109 S.Ct. 706, 721. See also, Adarand, 515 U.S. 200, 235, 115 S. Ct. 2097, 2117; Hopwood v. State of Texas, 78 F.3d 932, 951 (5th Cir. 1996).

¹⁵ Id. at 496-97, 723. See Miller v. Johnson, 515 U.S. 900, 922, 115 S.Ct. 2475, 2491 (1995).

¹⁶ Id. at 498, 504.

rely on generalized assertions that there has been past discrimination in an entire industry because such assertions do not provide the guidance a legislative body will need in order to determine the precise scope of the injury to be redressed.¹⁷

Since all racial classifications are viewed as legally suspect, the governing body must show a "strong basis in evidence" of discrimination in order to justify any enactment of race conscious legislation. Merely stating a "benign" or "remedial" purpose does not constitute a "strong basis in evidence" that the remedial plan is necessary, nor does it establish a *prima facie* case of discrimination. The government actor must identify the discrimination it seeks to redress.¹⁸ Particularized findings of discrimination are required under Croson, and although Croson also places the burden on the government to demonstrate a "strong basis in evidence", the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before the government may take affirmative steps to eradicate discrimination.

In Concrete Works I, 36 F.3d 1513 (10th Cir. 1994), the Tenth Circuit Court of Appeals reversed the District Court's granting of summary judgment for the City of Denver, which had determined that Denver's factual showing of past race and gender discrimination justified its compelling government interest in remedying the discrimination. In reversing, the Tenth Circuit held that factual issues of dispute existed about the accuracy of Denver's public and private discrimination data, but noted that Denver had shown evidence of discrimination, in both the award of public contracts and within the Denver Metropolitan Statistical Area (MSA) that was particularized and geographically based. On remand, Denver needed only to come forward with evidence that its ordinance was narrowly tailored, whereupon it became Concrete Works' burden to show that this was not the case.

The types of evidence routinely presented to show the existence of a compelling interest include statistical and anecdotal evidence.¹⁹ Where gross statistical disparities exist, they alone may constitute *prima facie* proof of a pattern or practice of discrimination; however, anecdotal evidence, such as testimony from minority contractors, is most useful as a supplement to strong

¹⁷ Id. at 498-99, 724. See Miller, 515 U.S. 900, 921, 115 S.Ct. 2475, 2491.

¹⁸ Id. at 500-501, 725.

¹⁹ Id. at 501, 725-26. See, United Black Firefighters Assn. v. City of Akron, 976 F.2d 999, 1009 (6th Cir. 1992). See also, Engineering Contractors, 122 F.3d 895 (11th Cir. 1997).

statistical evidence.²⁰ Anecdotal evidence is rarely so dominant that it can, by itself, establish discrimination under Croson's standards; however, the "combination of anecdotal and statistical evidence" is viewed by the courts as "potent."²¹

If there is a strong basis in evidence to justify a race or ethnic program, the next step of the strict scrutiny test is whether the MBE program is narrowly tailored to redress the effects of discrimination. Racial and ethnic preferences must be a remedy of last resort.²² Again, the Supreme Court considered four fundamental factors in deciding Croson. The Court's first inquiry was whether the City had considered race-neutral measures, but found them to be ineffective, before proceeding to a race-conscious remedy. The Court then examined the basis offered for the goals selected, and whether the program provided for waivers. Finally, the Court examined whether the program applied only to MBEs operating in the geographic jurisdiction covered by the program.

Other considerations on the viability of programs include the flexibility and duration of the program, that is, whether the program contains a sunset provision or other mechanisms for periodic review of its effectiveness. These mechanisms ensure that the program does not last longer than its intended remedial purpose. Furthermore, these mechanisms serve to maintain the purity of the relationship of numerical goals to the relevant labor market, as well as the impact of the relief on the rights of third parties.²³ In Ensley Branch NAACP v. Seibels, 31 F.3d 1548 (11th Cir. 1994), the Eleventh Circuit U.S. Court of Appeals also held that four factors should be taken into account when evaluating whether a race or ethnicity-conscious affirmative action program is narrowly tailored. These factors included: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of the numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties.²⁴

²⁰ Concrete Works, 36 F.3d 1513, 1520. (10th Cir. 1994). See Engineering Contractors, 122 F.3d 895, 125-26 (11th Cir. 1997); Ensley Branch v. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994).

²¹ Coral Construction Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991).

²² Engineering Contractors, *supra*, at 926.

²³ Adarand, 515 U.S. 200, 238, 115 S. Ct. 2097, 2118.

²⁴ Ensley Branch, 31 F.3d 1548, 1569 (11th Cir. 1994); Webster v. Fulton County, GA at 1362.

(2) Intermediate Scrutiny

The Croson decision did not evaluate women-owned business ("WBE") programs, although subsequent federal appellate courts have addressed and set forth guidelines for evaluating gender-based affirmative action programs. Most of these courts have adopted the intermediate scrutiny analysis, rather than the strict scrutiny analysis, which is applied to race conscious programs. As demonstrated by the discussions below, it remains unclear how the review of evidence of discrimination for an intermediate level of scrutiny truly differs from strict scrutiny.

In Coral Construction Company v. King County, 941 F.2d 910 (9th Cir. 1991), cert. denied, 502 U.S. 1033, 122 S.Ct. 875, 116 L.Ed. 2d. 780 (1992), the Ninth Circuit U. S. Court of Appeals applied an intermediate scrutiny standard in reviewing the WBE section of the county's ordinance. The Third Circuit U.S. Court of Appeals applied an intermediate level of review in its ruling in Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6.F.3d 990 (3rd Cir. 1993). The Court acknowledged that it is unclear whether statistical evidence is required, along with anecdotal evidence, to establish the standard of discrimination necessary to satisfy the intermediate scrutiny standard; and if so, how much statistical evidence is necessary. The Court struck down the WBE portion of Philadelphia's program, finding that the City had no statistical evidence and insufficient anecdotal evidence for women-owned construction firms.

The Eleventh Circuit U. S. Court of Appeals in Ensley Branch NAACP v. Seibels addressed the question of standard of review in a Title VII action.²⁵ In this decision, the Eleventh Circuit rejected the argument that, based on Croson, the Supreme Court intended strict scrutiny to apply to gender-conscious programs challenged under the Equal Protection Clause. Subsequent to the Eleventh Circuit's decision in Ensley, the Supreme Court decided United States v. Virginia, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), invalidating Virginia's maintenance of the single sex Virginia Military Institution (VMI). Instead of deciding the constitutionality of the VMI program under intermediate scrutiny, the Court held that "parties who seek to defend gender-based government action must demonstrate an 'exceedingly

²⁵ 31 F.3d 1548, 1579 (11th Cir. 1994).

persuasive justification' for that action."²⁶ The Court then applied the "exceedingly persuasive justification" standard in invalidating the VMI program. Justice Rehnquist concurred only in the judgment, noting that "the Court . . . introduces an element of uncertainty respecting the appropriate test."²⁷ Justice Scalia dissented, suggesting that the majority had effectively adopted a strict scrutiny standard to judge the constitutionality of classifications that deny individuals opportunity on the basis of sex.²⁸ The majority neither denied nor affirmed Justice Scalia's analysis.

It is not certain whether the Supreme Court intended the VMI decision to signal a heightening in scrutiny of gender-based classifications. Nevertheless, recent federal district court cases, such as Engineering Contractors Assn. of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895 (11th Cir. 1997), have continued to confine their analysis of WBE programs to traditional intermediate scrutiny.²⁹ In Engineering Contractors, the Eleventh Circuit U. S. Court of Appeals noted that the measure of evidence required for gender classification is less clear and agreed with the Third Circuit's holding that intermediate scrutiny requires that evidence be probative, while adding that probative must be "sufficient as well."

b. Passive Participation

Strict scrutiny requires a strong basis in evidence of either active participation by the government in prior discrimination or *passive participation* by the government in discrimination by the local industry.³⁰ In Croson, the Supreme Court opined that municipalities have a compelling interest in ensuring that public funds do not serve to finance private discrimination and indicated that local governments may be able to take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of private discrimination.

Lower court rulings since Croson have provided more guidance on passive participation by local governments. In Concrete Works of Colorado Inc v. The City and County of Denver, 36 F. 3rd 1513 (10th Cir. 1994), the Tenth Circuit held that it was sufficient for the local government

²⁶ U.S. v. Virginia at 529, 2274.

²⁷ Id. at 559, 2288.

²⁸ Id. at 571, 2294.

²⁹ 122 F.3d 895, 907-08 (11th Cir. 1997).

³⁰ Croson, 488 U.S. at 491-92, 109 S.Ct. at 537-38.

to demonstrate that it was engaging in passive participation in discrimination rather than showing that it actively participated in the discrimination. Thus, the desire for a government entity to prevent the infusion of public funds into a discriminatory industry is enough to satisfy the requirement. As such, if there is evidence that the City of Cincinnati is infusing public funds into a discriminatory industry, then the City has a compelling interest in remedying the effects of such discrimination, although there must be evidence of exclusion or discriminatory practices by the contractors themselves.

The court in Concrete Works wrote that, "neither Croson nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program... Although we do not read Croson as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race or gender conscious program."³¹

In Adarand Constructors v. Slater, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit U.S. Court of Appeals addressed the constitutionality of the use, in a federal transportation program, of a subcontractor compensation clause which employed race-conscious presumptions in favor of minority and disadvantaged business enterprises. In addressing the federal government's evidentiary basis to support its findings of discrimination against minorities in the public funded and private construction industry, the Court did not interpret Croson as requiring that the municipality identify the exact linkage between its award of public contracts and private discrimination. The Tenth Circuit noted that the earlier Concrete Works' city and county had not demonstrated the necessary finding of discrimination:

Unlike Concrete Works, the evidence presented by the government in the present case demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding

³¹ 36 F.3d 1529.

from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presents further evidence in the form of local disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs.³²

In Adarand v. Slater, the federal government's evidence consisted of numerous congressional investigations, hearings, local disparity studies and anecdotal evidence demonstrating discrimination by prime contractors, unions and financial lenders in the private market place. The Court of Appeals concluded that the government's evidence had demonstrated as a matter of law that there was a strong basis in evidence for taking remedial action to address the effects of prior and present discrimination, and found that Adarand had not met its burden of proof to refute the government's evidence.³³

Although the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of public funds, the same interest applies to municipalities such as Cincinnati as well. "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice".³⁴ The strict scrutiny standard of review and the benchmark of strong basis in evidence for the government's conclusion that the evils of racial prejudice must be remedied, applies to state and local governments as well as the federal government.

3. Permissible Evidence

As stated above, in Croson, the U. S. Supreme Court concluded that state and local governments have a compelling interest in remedying identified past and present discrimination within their jurisdictions. Courts must still assess whether a public entity has the requisite factual support for its M/WFBE program in order to satisfy the particularized showing of

³² 228 F.3d 1147 (Emphasis Added.)

³³ Id at 1147, 1176.

³⁴ See Croson 488 U.S. at 492 (citing Norwood v. Harrison 413 U.S. 455).

discrimination required by Croson. This factual support can be developed from statistical and anecdotal evidence, both of which are discussed below.

a. Anecdotal Evidence

The majority decision in Croson impliedly endorsed the inclusion of personal accounts of discrimination.³⁵ According to the Croson standard, however, selective anecdotal evidence about MBE experiences alone would not provide a sufficient evidentiary basis to demonstrate public or private discrimination in a municipality's construction industry.³⁶ Nonetheless, personal accounts of actual discrimination or the effects of discriminatory practices may complement empirical evidence. In addition, anecdotal evidence of a governmental entity's institutional practices that provoke discriminatory market conditions is particularly probative. Thus, courts have required the inclusion of anecdotal evidence of past or present discrimination.³⁷

In Coral Construction Company v. King County, the Ninth Circuit U.S. Court of Appeals concluded that "the combination of convincing anecdotal and statistical evidence" was potent.³⁸ In addition, the Ninth Circuit approved the combination of statistical and anecdotal evidence used by the City of San Francisco in enacting its M/WFBE ordinances.³⁹ Also, the Third Circuit has suggested that a combination of empirical and anecdotal evidence was necessary for establishing a prima facie case of discrimination.⁴⁰

On the other hand, neither empirical evidence alone, nor selected anecdotal evidence alone, provide a strong enough basis in evidence to demonstrate public or private discrimination in a municipality's construction industry to meet the Croson standard.⁴¹ In O'Donnell Construction v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992), the Court reversed the

³⁵ Croson, 488 U.S. at 480, 109 S.Ct. at 714-15 (noting as a weakness in the City's case that the Richmond City Council heard "no direct evidence of race conscious discrimination on the part of the city in letting contracts or any evidence that the City's prime contractors had discriminated against minority-owned subcontractors").

³⁶ See Concrete Works, 36 F. 3rd at 1520.

³⁷ See Contractors Assn., 6 F.3d 990, 1002-03 (3rd Cir. 1993) (weighing Philadelphia's anecdotal evidence); Coral Construction Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991) ("[T]he combination of convincing anecdotal and statistical evidence is potent"); Cone Corp. v. Hillsborough County, 908 F.2d 908, 916 (11th Cir. 1990) (supplementing Hillsborough County's statistical evidence with testimony from MBEs who filed complaints to the County about prime contractors' discriminatory practices), cert. denied, 498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990); Engineering Contractors, 122 F.3d at 925-26.

³⁸ 941 F.2d at 919.

³⁹ Associated General Contractors of California, Inc. v. Coalition for Economic Equity, et al., 950 F.2d 1401 (9th Cir. 1991), cert. denied 503 U.S. 985, 112 S.Ct. 1670, 118 L.Ed. 2d 390 (1992).

⁴⁰ Eastern Contractors, 6 F. 3rd 990, 1003 (3rd Cir. 1993).

⁴¹ Concrete Works, 36 F. 3rd 1513.

denial of a preliminary injunction for the plaintiff because the District of Columbia failed to prove a "strong basis in evidence" for its MBE program. The Court held in favor of the plaintiff because much of the evidence the District offered in support of its program was anecdotal. The Court opined, "anecdotal evidence is most useful as a supplement to strong statistical evidence-- which the Council did not produce in this case".⁴²

In Associated General Contractors of America v. City of Columbus, 936 F. Supp 1363 (S.D. Ohio 1996), vacated on other grounds 172 F.3d 411 (6th Circ. 1999), the District Court stated that the City's investigation was poorly executed for several reasons. According to the Court, no efforts were made to verify reports of discrimination, no attempts were made to determine whether similarly situated majority-owned firms were treated more favorably than M/WFBE firms, and political pressures may have clouded the fact finding process. The Court concluded that the anecdotal evidence in that case fell short of proof of pervasive discrimination.

Legally, plaintiffs are entitled to have a government's anecdotal evidence subjected to the test of trial before the court determines whether it actually supports a sound basis in the evidence of discrimination. Associated General Contractors v. the City of Columbus at 1428. Additionally, in Engineering Contractors (supra), the federal district court held that, "we have found that kind of evidence [anecdotal] to be helpful in the past, but only when it was combined with and reinforced by sufficiently probative statistical evidence."⁴³

Accordingly, a combination of statistical disparities in the utilization of M/WFBEs and particularized anecdotal accounts of discrimination are required to satisfy the factual predicate. This study has included anecdotal evidence of past and present discrimination in order to establish the factual predicate by the aforementioned guidelines.

b. Statistical Data

Croson also held that an inference of discrimination might be made with empirical evidence that demonstrates "a significant statistical disparity between the number of qualified minority contractors . . . and the number of such contractors actually engaged by the locality or

⁴² O'Donnell, 963 F.2d 420, 427 (D.C. Cir. 1992).

⁴³ 122 F. 3rd at 925 (11th Cir. 1997).

the locality's prime contractors."⁴⁴ A governmental actor must, therefore, demonstrate that gross statistical disparities exist between the proportion of MBEs awarded government contracts and the proportion of MBEs in the local industry "willing and able to do the work," in order to justify its use of race conscious contract measures.⁴⁵ In order to adequately assess statistical evidence, there must be evidence identifying the basic qualifications of minority contractors "willing and able to do the job" and the Court must determine, based upon these qualifications, the relevant statistical pool with which to make the appropriate statistical comparisons.⁴⁶ Subsequent lower court decisions have provided guidelines for statistical analyses sufficient for satisfying the Croson factual predicate. Qualified, willing and able are the pillars of the Croson case, and the relevant question is how to go about determining which businesses are qualified, willing and able.

Webster v. Fulton County, 51 F. Supp. 2d 1354 (N.D. Ga. 1999), presents another method of determining the statistical pool from which quantitative data are collected. In this case, white male and female plaintiffs, owners of a landscaping and tree removal service, the Webster Greenthumb Company, brought suit against the Fulton County, Georgia MWBE Program enacted in 1994. The Court analyzed the statistical factual predicate that had been developed by Fulton County relying heavily on Croson, and a more recent Eleventh Circuit opinion, Engineering Contractors Association v. Metropolitan Dade County, 122 F.3d. 895 (11th Cir. 1997). In Webster, the Court indicated that it favored census data for determining availability. Other courts have made it clear that they believe the most relevant data to be bidder data, that is, data that determine availability based on the number of minority bidders in contrast to the number of majority bidders. The Court also suggested that bid data be analyzed, with the total number of bids submitted by all parties divided by the total number of bids submitted by minority firms. See also, George LaNoue, Who Counts? Determining the Availability of Minority Businesses for Public Contracting 21 Harv.3.L. & Pub. Policy 793. LaNoue writes that although this problem has consumed an enormous volume of resources, beyond agreeing that "measuring availability is the key issue in performing disparity analysis", thus far no consensus has evolved among scholars or practitioners regarding methods of measuring availability.

⁴⁴ Croson, 488 U.S. 469, 509, 109 S.Ct. 706, 730.

⁴⁵ Ensley Branch, NAACP 31 F3d 1548, 1565 (11th Cir. 1994).

⁴⁶ Engineering Contractors, 122 F. 3rd at 925 (11th Cir. 1997).

(1) Availability

The method of calculating M/WFBE availability has varied from case to case. In Contractors Association of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 990 (3rd Cir. 1993) the Court stated that available and qualified minority owned businesses comprise the “relevant statistical pool” for purposes of determining availability. The Court permitted availability to be based on the metropolitan statistical area ("MSA") and local list of the Office of Minority Opportunity, for non-MWBEs, census data. In Associated General Contractors of America v. City of Columbus, 936 F. Supp 1363 (1996), the City’s consultants collected data on the number of M/WFBE firms in the Columbus MSA, in order to calculate the percentage of available M/WFBE firms. This is referred to as the rate of availability. Three sources were considered to determine the number of M/WFBEs “ready willing and able” to perform construction work for the City. None of the measures of availability purported to measure the number of M/WFBEs who were qualified and willing to bid as prime contractor’s on City construction projects.

The issue of availability was also examined by the Court in Contractors Association of South Florida, Inc., et al v. Metropolitan Dade County, et al, 122 F.3d 895 (11th Cir. 1997). Here, the Court opined that when reliance is made upon statistical disparity, and special qualifications are necessary to undertake a particular task, the relevant statistical pool must include only those minorities qualified to provide the requested services. Moreover, these minority firms must be qualified, willing and able to provide the requested services. If the statistical analysis includes the proper pool of eligible minorities, any resulting disparity, in a proper case, may constitute prima facie proof of a pattern or practice of discrimination.

In a relatively recent opinion by the Sixth Circuit U. S. Court of Appeals in Associated General Contractors of Ohio, Inc., et al v. Sandra A. Drabik, et al, 214 F.3d 730 (6th Cir. 2000), the Court ruled that the State of Ohio failed to satisfy the strict scrutiny standard in order to justify the State’s minority business enterprise act, because of its reliance on statistical evidence that did not account for which firms were qualified, willing and able to perform on construction contracts. The Court stated:

And although Ohio's most 'compelling' statistical evidence compares the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio—thus marshaling stronger statistics than the statistics in *Croson* - it is still insufficient. The problem with Ohio's statistical comparison is that the percentage of minority-owned businesses in Ohio (7% as of 1978) did not take into account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing and able to perform state construction contracts.

Further, although noting that the Drabik case involved more data than was submitted in Croson, the Court still found the data insufficient under strict scrutiny.

(2) Utilization

Utilization is a natural corollary of availability, in terms of statistical calculation. By calculating the percentage of contracting dollars paid to M/WFBE construction firms, one can derive the *rate of utilization*.

(3) Disparity Index and Croson

To demonstrate the under-utilization of M/WFBEs in a particular area, parties can employ a statistical device known as the *disparity index*.⁴⁷ The disparity index is calculated by dividing the percentage of M/WFBE participation in government contracts by the percentage of M/WFBEs in the relevant population of local firms. A disparity index of one (1) demonstrates full M/WFBE participation, whereas the closer the index is to zero, the greater the M/WFBE under-utilization. Some courts multiply the disparity index by 100, thereby creating a scale between 0 and 100, with 100 representing full M/WFBE utilization.

(a) Standard Deviation

The number calculated via the disparity index is then tested for its validity through the application of a standard deviation analysis. Standard deviation analysis measures the probability that a result is a random deviation from the predicted result (the more standard deviations, the lower the probability the result is a random one.) Social scientists consider a

⁴⁷ See Contractors Assn., 6 F.3d 990, 1005 (3rd Cir. 1993) (Third Circuit joining the First, Ninth, and Eleventh Circuits in relying on disparity indices to determine whether a municipality satisfies Croson's evidentiary burden).

finding of two standard deviations significant, meaning that there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor. The Eleventh Circuit has directed that "where the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that [employees] were hired without regard to race would be suspect."⁴⁸

(b) Statistical Regression Analysis

Another issue that arose in the Webster case was that of the *statistical significance* tests. The Court indicated that the test employed in the Engineering Contractors case should be used, wherein two standard deviations, or any disparity ratio higher than .80, which is insignificant, should be used.⁴⁹ The Webster court criticized the Fulton County expert for failing to use a regression analysis to determine the cause of the disparity. The Court likewise discredited the post-disparity study for failing to use regression analysis to determine if underutilization was due to firm size or inability to obtain bonding and financing.⁵⁰

The Webster court noted that the Court of Appeals in Engineering Contractors affirmed the District Court's conclusion that the disparities offered by Dade County's experts in that case were better explained by firm size than discrimination. Dade County had conducted a regression analysis to control for firm size after calculating disparity indices with regard to the utilization of Black-owned Business Enterprises (BBEs), Hispanic-owned Business Enterprises (HBEs), and Women-owned Business Enterprises (WBEs) in the Dade County market, by comparing the total amount of contracts awarded to the amount each group would be expected to receive based on the group's bidding activity and the awardee success rate. Although there were a few unexplained disparities that remained after controlling for firm size, the District Court concluded, and the Court of Appeals affirmed, that there was no strong basis in evidence of discrimination for BBEs and HBEs and it did not sufficiently demonstrate the existence of discrimination against WBEs in the relevant economic sector.⁵¹ The court noted that finding a single explained

⁴⁸ Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1556 (11th Cir. 1994). Quoting Hazelwood, 433 US at 308 n.13, 97 S.Ct 2742 n.13 quoting Castaneda v. Partida, 430 U.S.482, 497,n.17, 97 S.Ct 1272, 1281 n.17, 51LEd 2d 498 (1977).

⁴⁹ Webster v. Fulton County, Ga., 51 F. Supp. 2d 1354, 1368 (1999).

⁵⁰ Webster at 1370.

⁵¹ Webster at 1370, Engineering Contractors, 122 F3d 917.

negative disparity against BBEs for the years 1989-1991 for a single SIC code was not enough to show discrimination.

Courts have used these M/WFBE disparity indices to apply the "strong basis in evidence" standard in Croson. For instance, the Eleventh Circuit held that a 0.11 disparity "clearly constitutes a prima facie case of discrimination indicating that the racial classification in the County plan was necessary" under Croson.⁵² Based on a disparity index of 0.22, the Ninth Circuit upheld the denial of a preliminary injunction to a challenger of the City of San Francisco's MBE plan based upon an equal protection claim.⁵³ Consistent with these, the Third Circuit held that a disparity of 0.04 was "probative of discrimination in City contracting in the Philadelphia construction industry."⁵⁴

4. Geographic Scope of the Data

In Croson, the Court observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the disputed industry to draw conclusions about prevailing market conditions in their respective regions.⁵⁵ However, to confine the permissible data to a governmental entity's strict geographical borders would ignore the economic reality that contracts are often awarded to firms located in adjacent areas. Thus, courts closely scrutinize pertinent data related to the jurisdictional area of the state or municipality.

Generally, the scope of the statistical analyses pertains to the geographic market area from which the governmental entity makes most of its purchases. It has been deemed appropriate to examine the existence of discrimination against M/WFBEs even when these areas go beyond the political boundaries of the local jurisdictions. In addition, disparities concerning utilization, employment size and formation are also relevant in determining discrimination in a marketplace.

⁵² Cone Corp., 908 F.2d 908, 916 (11th Cir. 1990).

⁵³ AGC v. Coalition for Economic Equity, 950 F.2d 1401, 1414 (9th Cir. 1991).

⁵⁴ Contractors Assn. 6 F.3d 990, 1005 (3rd Cir. 1993).

⁵⁵ Croson, 488 U.S. 469, 504, 109 S.Ct. 706, 727.

Court decisions have allowed jurisdictions to utilize evidence of discrimination from nearby public entities and from within the relevant private marketplace. Nevertheless, extra-jurisdictional evidence must still pertain to the operation of an industry within geographic boundaries of the jurisdiction.

Accordingly, it can be inferred that the most appropriate and legally defensible scope of empirical data for the City of Cincinnati is the City of Cincinnati and multi-state metropolitan areas, which include areas that are outside the City of Cincinnati.

5. Post-Enactment Evidence

In Croson, the Court stated that a state or local government "must identify that discrimination . . . with some specificity before they may use race-conscious relief."⁵⁶ However, the Court declined to require that all relevant evidence of such discrimination be gathered prior to the enactment of the program. *Pre-enactment evidence* refers to evidence developed prior to a governmental entity enacting a M/WFBE program, and could tentatively have been relied upon by the governmental entity in adopting the affirmative action program. Absent any pre-enactment evidence of discrimination, a state or local government would be unable to satisfy Croson. On the other hand, *post-enactment* evidence is that which has been developed since the affirmative action program was enacted and therefore was not specifically relied upon as a rationale for the government's race and gender conscious efforts. As such, most subsequent rulings have interpreted Croson's evidentiary requirement to include post-enactment evidence.

An exception is West Tennessee Chapter of Associated Builders and Contractors v. Board of Education of the Memphis City Schools, 64 F.Supp.2d 714 (W.D. Tenn. 1999). In that case the District Court was faced with the issue of whether "post enactment evidence" is sufficient to establish a strong basis upon which a race conscious program can be supported. The late Judge Jerome Turner opined that, although the court in Croson was not faced with the issue of post enactment evidence, much of the language in the opinion suggests that the Court meant to require the governmental entity to develop the evidence before enacting a plan. Furthermore, when evidence of remedial need is not developed until after a racial preference plan is enacted, that evidence provides no insight into the motive of the legislative or administrative body.

The Court in West Tennessee Associated Builders concluded that admitting post enactment evidence is contrary to Supreme Court precedent as developed in Wygant, Croson, and Shaw.⁵⁷ The Court held that post enactment evidence may not be used to demonstrate that the government's interest in remedying prior discrimination was compelling. It is important to note that this opinion is not representative of the majority of case law on this issue, although it reflects a possible trend that warrants discussion and consideration. The case has additional significance because the State of Tennessee is within the jurisdiction of the United State Court of Appeals for the Sixth Circuit as is the City of Cincinnati.

Associated General Contractors of Ohio v. Sandra Drabik, 50 F.Supp.2d. 741, 763 (1999) is another relatively recent opinion wherein the District Court for the Eastern Division of Ohio stated that in order to support a compelling state interest for race-based preferences, challenged on equal protection grounds, evidence of past discrimination must be reasonably current.

Moreover, the Court ruled that evidence of purported racial discrimination that was more than twenty (20) years old was too remote to form the basis for a compelling governmental interest justifying the enactment of a race-based affirmative action program. This line of reasoning, in terms of the currency of statistical and anecdotal evidence, was fully considered by Griffin & Strong, P.C. while formulating the methodology employed in conducting Cincinnati's disparity study.

Early post-Croson decisions permitted the use of post-enactment evidence to determine whether an M/WFBE program complies with Croson.⁵⁸ In Ensley, the Eleventh Circuit explicitly held that post-enactment evidence is properly introduced in the record and relied upon by district courts in determining the constitutionality of government race and gender-conscious programs:

Although Croson requires that a public employer show strong evidence of discrimination when defending an affirmative action plan, the Supreme Court has never required that, before implementing affirmative action, the employer not have proved that it has discriminated. On the contrary, further finding of

⁵⁶ Croson, 488 U.S. 469, 504, 109 S.Ct. 706, 727.

⁵⁷ Wygant v. Jackson Bd. Of Ed., 476 U.S. 267, 106 S. Ct. 1842 (1986), City of Richmond v. J. A. Croson Co., 488 U.S. 469, 109 S. Ct. 706 (1989), Shaw v. Hunt, 517 U.S. 899, 116 S. Ct. 1894 (1996).

⁵⁸ See, e.g. Contractors Assn., 6 F.3d , 990, 1003-04 (3rd Cir. 1993); Harrison & Burrows Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 60 (2d Cir. 1992); Coral Constr., 941 F.2d 910, 921 (9th Cir. 1991).

discrimination need neither precede nor accompany the adoption of affirmative action.⁵⁹

It follows, therefore, that a race and gender-conscious program implemented by the City of Cincinnati may be supported by post-enactment evidence of discrimination. Moreover, post-enactment evidence is necessary to determine the program's success for narrow tailoring and assessment of continued need after the program's initial term has expired. Associated General Utility Contractors of MD v. Mayor of Baltimore, F Supp. 2d 613,620.⁶⁰

6. Burdens of Production and Proof

Croson placed the initial burden of production on the state or local governmental actor to demonstrate a "strong basis in evidence" that its race and gender-conscious contract program is aimed at remedying identified past or present discrimination. Such a program developed in response to discrimination is sustainable against an equal protection challenge so long as it is based upon strong evidence of discrimination. An inference of discrimination may be made by the locality using empirical evidence that proves a significant statistical disparity between the number of qualified M/WFBEs and the number of M/WFBEs actually utilized by the government, or its prime contractors. Furthermore, the quantum of evidence required for the entity must be determined on a case-by-case basis and in the context and breadth of the M/WFBE program it advanced.⁶¹ If the local government is able to do this, then the burden shifts to the challenging party to rebut its showing.⁶²

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.⁶³

⁵⁹ Ensley Branch, NAACP, 31 F.3d 1548, 1565 (11th Cir. 1994).

⁶⁰ See also Contractors Association of Eastern, PA, Inc. v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996). (Post enactment evidence admissible on the issue of narrow tailoring and the use of race neutral alternatives).

⁶¹ See Concrete Works, 36 F.3d 1513 (10th Cir. 1994).

⁶² See Contractors v. Philadelphia, 6 F.3d 990, 1007.

⁶³ Mazeske v. City of Chicago 218 F.3d 820 (7th Cir. 2000).

D. CHARTING A COURSE – Tailoring Flexible Remedies

Under the Croson framework, any affirmative action plan must be narrowly tailored to ameliorate the effects of past discrimination identified in order to justify the use of a race-conscious remedy. Cases subsequent to Croson have provided significant guidance on how remedies should be narrowly tailored.

Post-Croson cases have followed the general guidelines listed below in construing the elements of the narrow tailoring prong:

1. Relief should be limited to minority groups for which there is identified discrimination;
2. Remedies should be limited to redressing the discrimination within the boundaries of the enacting jurisdiction;
3. The goals of the programs should be flexible and provide waiver provisions;
4. Race and/or gender neutral measures should be considered; and
5. The program should include provisions or mechanisms for periodic review and sunset.

M/WFBE programs must be designed so that the benefits of the programs are directed toward those firms that faced discrimination in the local marketplace. To withstand a challenge, relief must extend to those minority groups for which there is evidence of discrimination. M/WFBE firms from outside the local market must show that they have unsuccessfully attempted to do business within the local marketplace in order to benefit from the program.

The Sixth Circuit U. S. Court of Appeals in Associated General Contractors v. Drabik, affirmed the District Court's finding that the State of Ohio's minority business enterprise statute was not narrowly tailored to remedy past discrimination.⁶⁴ The Court found the statute lacked narrow tailoring because it suffered from under-inclusiveness and over-inclusiveness, (lumping together racial and ethnic groups without identified discrimination); it lacked a sunset date; and

⁶⁴ 214 F.3d 730 (6th Cir. 2000)

there was no evidence that Ohio had ever considered race neutral alternatives before adopting the plan to increase minority participation.⁶⁵

Croson requires that there not only be a strong basis in evidence for a conclusion that there has been discrimination, but it must also be conclusive that the particular remedy is made necessary by the discrimination. In other words, there must be proper fit between the evidence that discrimination exists and the remedy designed to address the discrimination. The Third Circuit, in Contractors Association of Eastern Pennsylvania, approved the District Court's finding that the subcontracting goal program was not narrowly tailored since there was no firm evidentiary basis for believing that non-minority contractors would not hire black subcontractors and much of the evidence found regarding the discrimination by the City of Philadelphia was against black "prime contractors" who were capable of bidding on City prime contracts.⁶⁶

Court rulings have held that neutral measures must be considered, but not necessarily exhausted, in order for M/WFBE programs to be enacted. Moreover, some courts have held that such measures could be enacted concurrently rather than enacted before race or gender-conscious measures. More recently decided cases such as Concrete Works, continue to suggest the kinds of neutral measures offered in Croson, such as assistance to new businesses and entrepreneurs, relaxation of bonding and insurance requirements, and removal of bureaucratic obstacles.⁶⁷

The recurrent theme throughout the cases is the idea that M/WFBE programs must provide flexibility. Project-by-project goal setting and waiver provisions are consistently raised as solutions to this concern. Indeed, another idea that has gained considerable acceptance is that goals, if established, need not directly correspond to current availability if there are findings that availability has been adversely affected by past discrimination. It also appears well settled that "review" or "sunset" provisions are necessary components to guarantee that remedies do not out-live their intended remedial purpose.

Despite almost twelve years of litigation since the Croson decision, the law in the area of race-conscious remedies used to ameliorate inequities in M/WFBE utilization in public

⁶⁵ 214 F.3d at 739

⁶⁶ Contractor's Association of Eastern PA, Inc. v. City of Philadelphia, 91F.3d 586, (3d Cir. 1996)

⁶⁷ Concrete Works v. City and County of Denver, Co., 86 F Supp. 2d 1042, 1077, 1078 (2000) citing Croson, 488 U.S. at 509-510.

contracting is still not completely settled. Nevertheless, data have been gathered and analyzed for this study in order to meet the most conservative standards and to allow for the maximum amount of flexibility and the narrowest of tailoring in the event that a race or gender-conscious program of some type is warranted by the findings.

II. ANALYSIS OF QUANTITATIVE EVIDENCE OF DISCRIMINATION

This chapter examines the issue of whether disparity exists between the availability of Minority and White Female Business Enterprises (M/WFBEs) and their utilization by the City of Cincinnati. The first section of this chapter deals with the data collection methodology, and the relevant market concepts. The second section provides a framework for the availability concept and discusses how the concept is applied to firms doing business with the City of Cincinnati. The third section discusses the City's contracting history with regard to Minority and White Female Business Enterprises and examines utilization according to various procurement categories. The last section provides an analysis of the availability of M/WFBEs as vendors to the City of Cincinnati, as compared to the City's utilization of such firms, and is followed by inference statistics.

A. ANALYSIS FRAMEWORK

1. Data Collection Methodology

The data collection process was initiated with a series of meetings with officials of the Office of Contract Compliance. The objective of these meetings was to assess the availability and location of contract files, and to obtain contract logs, vendors' files, and the most current M/WFBE certified lists. Other documents relevant to the statistical analysis were also requested and an assessment of the accessibility of the contract files or computer files was made in order to establish a general approach for data gathering.

During the data assessment meetings with officials at the Office of Contract Compliance, the Griffin & Strong, P.C. quantitative data collection team requested several of the available

reports and studies detailing contracting activities. In addition, an explanation was provided regarding the type of information being sought for Construction, Professional Services, and Supplies/Services. The contract logs, if available, would indicate the project or contract number; the successful bidder(s) and award/payment amount(s); award date and notice to proceed date; change orders; and subcontractors and subconsultants, with award/payment amounts for each year subdivided by race, ethnicity and gender of the successful bidder firm and subcontractor or subconsultant firms.

Once the data assessment was completed, a data-gathering plan was developed to provide a framework for the data collection effort. Spreadsheets with specific fields necessary for the study were developed by Griffin & Strong, P. C. and provided to the City's assigned computer consultant so that the data could be provided in the format most suitable for purposes of this study.

Data collected and analyzed for this study covers three distinct periods in the City of Cincinnati's recent history. The first period, referred to herein as the "Program Years", is an aggregation of the fiscal years from 1995 through 1998, a period during which the City of Cincinnati had in place a race and gender-conscious M/WFBE program. The second period covered by this study is Fiscal Year (FY) 1999, during which time the City of Cincinnati had no race or gender-conscious program in place, nor did it have a small business program in place. The third distinct period covered by this study is FY 2000 through FY 2001, during which time the City put in place a race neutral Small Business Enterprise (SBE) program. Accordingly, the total time span for which the purchasing and contracting history has been reviewed for this study is from FY 1995 through FY 2001. An analysis of construction utilization data for the Fort Washington Way project was conducted and was included in the final report. Data for Fort Washington Way cover the period from January 1, 1997 to March 31, 2002.

2. Relevant Market

The now commonly held idea that the relevant market area should encompass seventy-five to eighty-five percent of the "qualified" vendors that service a particular sector has its

origins in antitrust lawsuits.⁶⁸ In line with antitrust precepts, Justice O'Connor specifically criticized Richmond, VA for making Minority Business Enterprises (MBEs) all over the country eligible to participate in its set-aside programs.⁶⁹ In Croson, the Supreme Court of the United States reasoned that a mere statistical disparity between the overall minority population in Richmond, Virginia, which was 50% African American, and the award of prime contracts to minority-owned firms, 0.67% of which were African American-owned firms, was an irrelevant statistical comparison and was insufficient to raise an inference of discrimination. Justice O'Connor also wrote that the relevant statistical comparison is one between the percentage of minority business enterprises in the marketplace who were qualified to perform contracting work (including prime and sub-contractors) and the percentage of total City contracting dollars awarded to minority firms.

The Croson decision gave only general guidance as to how the actual availability and utilization of minority firms should be determined. Since Croson, however, a number of court decisions have addressed the question of which type of quantitative evidence is required in order to determine if there is a significant statistical inference of discrimination. One of the most common themes of recent court decisions is that to be considered "available", firms must meet the requisite qualifications to perform work for a local jurisdiction. In addition, the Court emphasized the need to provide evidence of discrimination within a specific geographic area, because, "the scope of the problem would vary from market to market."

In general, there are two methods primarily used to determine the "relevant market." The first method consists of ascertaining the geographic location of the contract awardees and vendors. In the second method, the entity's bidders' or vendors' lists are scrutinized to ascertain their geographic location. The former has gained more acceptance under the United States Justice Department's guidelines for defining relevant markets, particularly in antitrust and merger cases. Some consultants have modified the two main methods and developed an alternative method for determining an entity's relevant market by using the prime contractors (awardees) lists, the vendor lists, and the bidder lists.

⁶⁸ D. Burman. "Predicate Studies: The Seattle Model," Tab E of 11-12 Minority and Women Business Programs Revisited (ABA Section of Public Contract law, Oct. 1990)

⁶⁹ Croson, 488 U.S. at 506

The relevant market is established when the geographic area that meets one of the following is defined: 1) the area where 85% or more of the qualified vendors are located; 2) the area where 85% or more of the awardees are located; or, 3) the area where 85% or more of the bidders are located. Ideally, the application of these three criteria results in a unique relevant market designation. However, in cases where this is not true, criterion number three, the area where 85% or more of the bidders are located, is given greater weight because it more accurately reflects the spirit of the Supreme Court's test, which asserts that qualified firms in the area demonstrate that they are ready, willing and able to do business with governmental or other entities. In other words, when the relevant market is the same for the awardees, the vendors and the bidders for a procurement category, the decision to choose is easy. When there is a difference, the bidders are given more weight because many economists and researchers apply a rule of thumb that the relevant market is the geographical area in which a vast majority of the offerers or sellers to the relevant buyer are located.

The relevant market analysis for the City of Cincinnati indicates that 92% of the construction prime contractors (awardees) utilized by the City are located within the City; 6.66 percent are located in Hamilton County, but outside of the City; and 0.80 percent of the primes are located outside of the State of Ohio. Applying the above criteria, for construction, the relevant market is Hamilton County because Hamilton County contains all of the City, with its 92%, in addition to the 6.66% of the contractors that are in the portion of the County that lies outside the City of Cincinnati.

The analysis of the construction bidders' geographic location data indicates that more than 98 percent of the bidders utilized by the City of Cincinnati are located in Hamilton County. Therefore, the relevant market is Hamilton County when applying the bidder criterion.

The analysis of the vendors' geographic location information indicates that 100 percent of the vendors are located in Hamilton County when applying the vendor criterion.

Following the decision rule, Griffin & Strong, P.C. determined, by application of all of the standard measures for determining the relevant market, that for all procurement categories, the relevant market is Hamilton County.

Table 1
THE CITY OF CINCINNATI
RELEVANT MARKET ANALYSIS

	CONSTRUCTION	PROFESSIONAL SERVICES	SUPPLIES/SERVICES
Prime Contractors	Hamilton County	Hamilton County	Hamilton County
Bidders	Hamilton County	Hamilton County	Hamilton County
Vendors	Hamilton County	Hamilton County	Hamilton County

Source: Griffin & Strong, P.C

B. AVAILABILITY ESTIMATES

1. Methodology for Availability Analysis

Croson and subsequent decisions give only general guidance as to measuring availability. Instead, the court decisions have been more instructive on the question of what measures should not be used to estimate availability, such as those which emphasize firm size. A common theme throughout the court decisions is that a firm's qualification to perform work for a particular government entity is one of the key indicators that the firm is "available."

The determination of the availability of businesses for public contracting is crucial to the results of any disparity study. If availability is miscalculated, then inference statistics, including disparity indices or ratios, will also be in error.⁷⁰ While there are different approaches to measuring the number of available, qualified firms, Griffin & Strong, P. C. has applied to this study a very narrow definition of availability that includes firms that have demonstrated that they have attempted to do business with the City of Cincinnati. Census data will be used only for comparison purposes. Thus, availability has been determined by gathering bid data for each procurement category included in this study (construction, professional services and supplies/services) and applying the following criteria:

- a. The bidding firm does business within an industry group from which the City of Cincinnati makes certain purchases;

⁷⁰ La Noue, George R., "Standards for the Second Generation of Croson - Inspired Disparity Studies", The Urban Lawyer (The National Quarterly on State and Local Government Law), Summer 1994, Volume 26, No 3, p. 490

- b. The firm's owner has demonstrated that he or she believes the firm is qualified and able to perform the work, and is located within the relevant geographical area such that it can do business with the entity; and
- c. By the owner's actions, he or she has demonstrated an interest in obtaining work from the entity.

The measuring of availability is a benchmark in examining whether there are any disparities in the utilization of minority and female business enterprises in the market place. A highly cautious approach would be to rely on only the narrowest, most restrictive definitions; however, the narrowest measure might be influenced by the very patterns of discrimination being investigated by use of a comparison of utilization and availability.⁷¹ It must be noted that the approach Griffin & Strong, P.C. has taken for measuring availability is the more conservative of the options and, as such, could result in actual availability and patterns of discrimination in the relevant geographic marketplace being suppressed. At the same time, by using a conservative measure, the likelihood of overstating actual availability will tend to be reduced.

Once the City provided the necessary contract data, Griffin & Strong, P. C. developed a list of bidders and compiled a database that identified ethnicity, gender, race, city, and state for each bidder. We also distinguished the procurement categories involved. A discrete list sorted by type of procurement was then developed from the database, whereupon ethnicity, gender and race were properly identified for each bidder.

For each procurement category, availability was estimated by dividing the total of each individual group within the M/WFBE classification by the total of all discrete bidders. The following definitions are necessary for the availability estimations provided in the next section.

Let A= Availability Estimates
 A (Asian) = Availability Estimates for Asian Business Enterprises
 N (Asian) = Number of Asian Business Enterprises in the pool
 N (M/WFBE) = Number of Minority/White Female Owned Business Enterprises
 N(t) = Total number of businesses in the pool of bidders in the procurement category (for example, construction).

⁷¹ BBC, Research and Consulting, Pima County disparity Study, June 1994 p. v-3

2. Availability Estimates for the City of Cincinnati

Availability (A) is found by dividing the number of minority and/or women owned business enterprises by the total number of businesses in the pool of bidders. For instance, availability for Asian businesses is $A(\text{Asian availability}) = N(\text{Asian})/N(t)$ and availability for M/WFBE is $N(M/WFBE)/N(t)$.

Availability estimations were conducted for each procurement category, according to ethnicity, race, and gender. These estimates are displayed in Table 2 for the Program Years (FY95-FY98), Table 3 for FY99, Table 4 for FY2000 & FY2001, and estimates based on census data are depicted in Table 5.

Table 2

THE CITY OF CINCINNATI
AVAILABILITY ESTIMATE BASED ON THE POOL OF BIDDERS AND CENSUS DATA
BY
PROCUREMENT CATEGORY
(PROGRAM YEARS: FY95-FY98)
(%)

Procurement Category	Asian	African American	Hispanic	Native American	White Female/Women
Construction	2.84	13.41	1.21	0.40	2.43
Professional Services	1.76	2.70	0.45	0.05	17.52
Supplies/Services	0.61	4.85	0.24	0.36	1.45

Source: Griffin & Strong, P.C.

Note:

- 1) Professional Services availability estimates are based on data from the U.S. Census Bureau: 1997 Economic Census, surveys of Minority and Women-Owned Businesses in Hamilton County, Ohio.
- 2) Census data refer to Females of all ethnic groups as Women

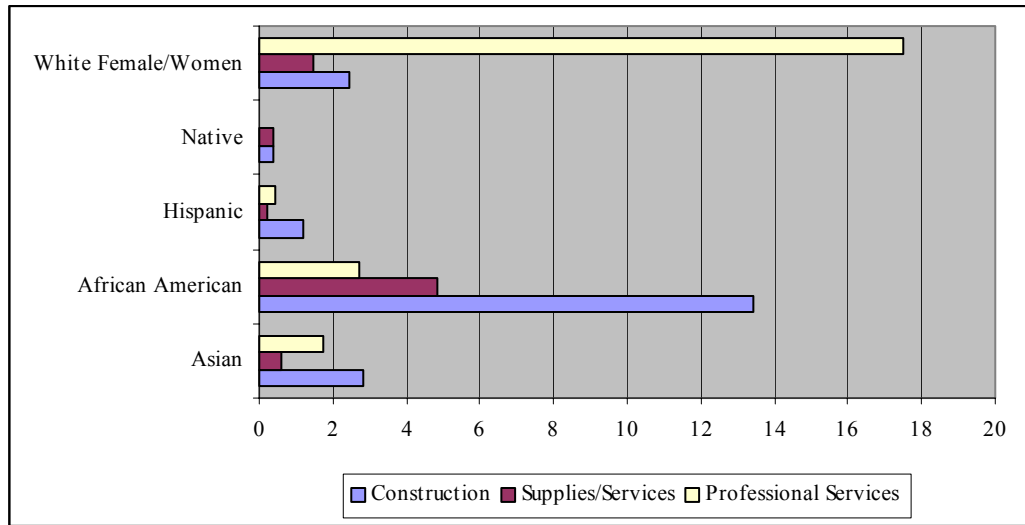


Table 3
THE CITY OF CINCINNATI
AVAILABILITY ESTIMATE BASED ON THE POOL OF BIDDERS AND CENSUS DATA
BY
PROCUREMENT CATEGORY
(FISCAL YEAR 99)
(%)

Procurement Category	Asian	African American	Hispanic	Native American	White Female/Women
Construction	2.99	5.97	1.49	0.75	2.24
Professional Services	1.76	2.70	0.45	0.05	17.52
Supplies/Services	0.80	5.62	0.80	0.80	0.80

Source: Griffin & Strong, P.C.

Note:

- 1) Professional Services availability estimates are based on data from the U.S. Census Bureau: 1997 Economic Census, surveys of Minority and Women-Owned Businesses in Hamilton County, Ohio.
- 2) Census data refer to Females of all ethnic groups as Women

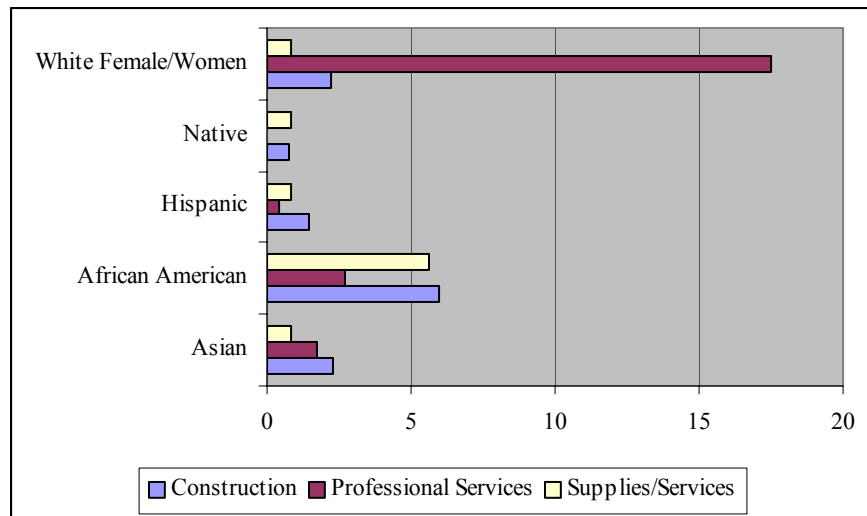


Table 4

THE CITY OF CINCINNATI
AVAILABILITY ESTIMATE BASED ON THE POOL OF BIDDERS AND CENSUS DATA
BY
PROCUREMENT CATEGORY
(FISCAL YEAR 2000)⁷²
(%)

Procurement Category	Asian	African American	Hispanic	Native American	White Female/Women
Construction	1.08	4.86	1.62	0.54	1.62
Professional Services	1.76	2.70	0.45	0.05	17.52
Supplies/Services	0.53	1.59	0.53	0.53	1.06

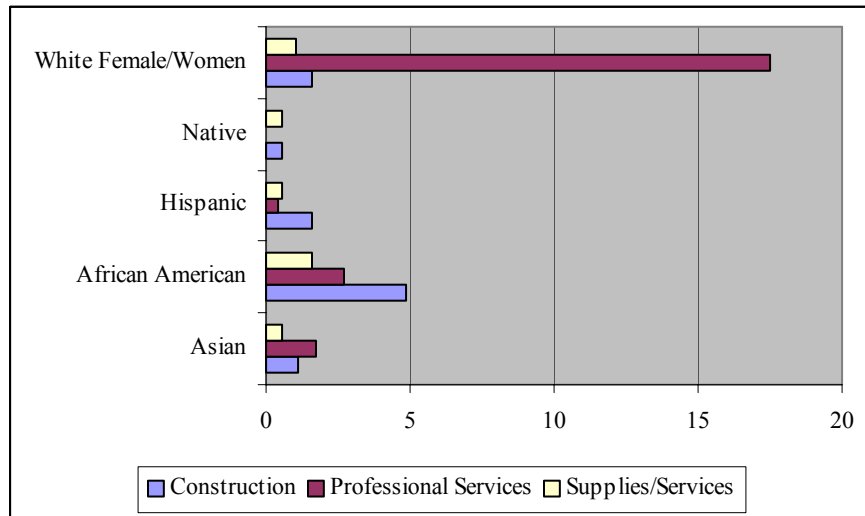
Source: Griffin & Strong, P.C.

Note:

1) Professional Services availability estimates are based on data from the U.S. Census Bureau: 1997 Economic Census, surveys of Minority and Women-Owned Businesses in Hamilton County, Ohio.

2) Availability estimates for Construction and Supplies/Services are based on bid data and Females refer to only White Females; all other Females (if any) are included in their respective race group;

Availability estimates for Professional Services are based on Census data and the Census Bureau uses Women to refer to Females of all ethnic groups.



⁷² Availability Estimates for FY2000 were used for FY2001.

Table 5

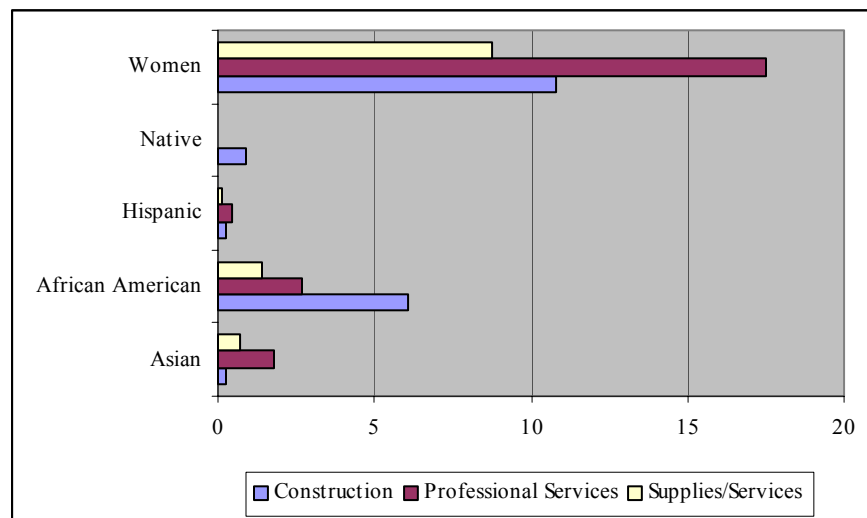
THE CITY OF CINCINNATI
AVAILABILITY ESTIMATE BASED ON CENSUS DATA IN HAMILTON COUNTY
BY
PROCUREMENT CATEGORY
(%)

Procurement Category	Asian	African American	Hispanic	Native American	Women
Construction	0.28	6.07	0.28	0.91	10.79
Professional Services	1.76	2.70	0.45	0.05	17.52
Supplies/Services	0.70	1.39	0.14	0.00	8.77

Source: Griffin & Strong, P.C.

Note:

These availability estimates are based on data from the U.S. Census Bureau: 1997 Economic Census, surveys of Minority and Women-Owned Businesses in Hamilton County, Ohio.



C. CONTRACTING ACTIVITY DATABASE AND DATA LIMITATIONS

The result of the data collection, verification and validation effort was the development of a database of contracting history for each procurement type. The process of gathering historical data, especially subcontracting information, poses unique challenges for consultants engaged in disparity studies. These challenges are not unique to the City of Cincinnati, but are consistent with studies of this nature. Within limitations of the data, Griffin & Strong, P.C. is confident that the databases developed using the electronic files from the City accurately reflect the City's

contracting history as regards Minority and White Female Business Enterprises. The data that were reviewed, verified, validated, and presented to the City of Cincinnati are the basis for the utilization analysis described below.

Cross tabulations of the data first by procurement categories (construction, professional services and supplies/services) and then by ethnicity, gender and race, provide the data disaggregation necessary to compute the utilization percentages and disparity indices, as will be described in the next sections of this chapter.

Data Limitations:

The disparity indices for professional services were calculated using availability estimates based on the U.S. Census Bureau, 1997 Economic Census; surveys of Minority and Women-Owned Businesses. Griffin & Strong, P. C. was unable to secure the names of firms that responded to RFPs during the Study Period; therefore, meaningful information could not be gathered to estimate availabilities for this procurement category. Accordingly, the disparity indices for professional services must be carefully interpreted.

D. UTILIZATION ANALYSIS

In this section, the summary of the total dollars expended by the City for each procurement category is broken down by fiscal year, and then by ethnicity, gender, and race. The analysis shows data for universal prime contractors and subcontractors by fiscal year and by procurement category. For each procurement category, utilization data for prime contractors and subcontractors are combined in a table that provides the total amount awarded to minority and female business enterprises by fiscal year. The last step of the utilization analysis consists of converting the total utilization into percentages for each M/WFBE group according to fiscal year.

There are two different data sets used for this utilization analysis. The first data set covers the period from FY95 through FY2001 (referred to hereinafter as the Study Period). This data set represents actual payments in Construction, Professional Services and Supplies/Services to firms by the City of Cincinnati in Hamilton County, Ohio. The second data set represents actual payments for Construction work or Professional Services performed at Fort Washington Way between January 1, 1997 and March 31, 2002. While payments to firms during the Study Period

are restricted to Hamilton County, payments to firms for the Fort Washington Way project are Statewide.

For each utilization and disparity index table, first a bottom line (Total) is calculated and referred to as Study period or FY95 through FY2001. Below the Study Period row is inserted the data for Fort Washington Way project (from 1/1/97 through 3/31/2002) and a second bottom line is calculated and referred to as “Study Period and Fort Washington Way”.

1. Minorities and White Female Business Enterprises’ Utilization in Construction.

The data for Fort Washington Way project is derived from a summary report covering the period from January 1, 1997 to March 31, 2002. The analysis of aggregate Construction expenditures includes prime and subcontractor dollars in the actual utilization dollars. Tables 6 and 7, (pages 44 and 45), show Construction utilization figures for prime contractors and subcontractors respectively. The overall utilization in dollars and percentages is displayed in Table 8.

Table 8 shows that overall, the level of participation in Construction contracts for Minority and White Female Business Enterprises amounted to \$50.091 million during the Program Years (FY95-FY98) or 33.13 percent of total spending of \$151.192 million during the same period.

Minority and White Female Business Enterprises received \$80.858 million or 21.44 percent of the total Construction dollars reviewed during the Study Period. They also received \$18.521 million of a total of \$228.495 million spent by the City of Cincinnati in Construction at Fort Washington Way between January 1, 1997 and March 31, 2002. Their participation rates ranged from a low of 6.41 percent in 2000 to a high of 43.09 percent in 1997.

While all minority groups were awarded Construction dollars from the City of Cincinnati at the prime and the subcontract levels, African American firms and Asian firms received the highest amount in Construction prime contracts during the Study Period. These firms received \$34.809 million and \$30.270 million, respectively, in payments over the course of the Study Period including for Construction work performed at Fort Washington Way. They were awarded

contracts during all the years of the study period except FY2000 for Asian firms. In FY 2000, a year in which Cincinnati had in place a small business enterprise program, but not a minority and female business program, African American firms received less than one million dollars in Construction awards and Asian firms did not receive any Construction awards.

During the Study Period (FY95-FY2001) African American Business Enterprises received 8.44 percent of the total Construction dollars spent by the City of Cincinnati. They received only 1.31 percent of the construction dollars at Fort Washington Way.

The total participation of Asian Business Enterprises in Construction was \$30.270 million or 5.00 percent of the total dollars spent in Construction during the Study Period and at Fort Washington Way. They received 6.05 percent of the construction dollars during the Study Period and 3.26 percent at Fort Washington Way.

Hispanic firms received \$5.207 million, or 0.86 percent of the Construction dollars during the Study Period and for Construction work performed at Fort Washington Way. Native American firms received \$9.992 million, or 2.65 percent of the City's expenditures in Construction during the Study Period and \$3,169 or 1.39 percent at Fort Washington Way; and White Female firms received \$11.249 million, or 2.98 percent of the total dollars spent on Construction during the Study Period. They received \$4.548 million or 1.99 percent of Construction work performed at Fort Washington Way.

Relative to the Program Years, the total participation of Minority and Female Business Enterprises declined by 0.30 percent during fiscal year 1999, during which time the City did not have a minority and female business enterprise program in place. Measuring from the Program Years through FY2000 (the year in which the SBE program was in place), the total participation of M/WFBEs declined by 80.65 percent, as compared with the level of participation on Construction contracts during the Program Years (6.41 percent in FY2000 compared to 33.13 percent for the Program Years).

With the exception of White Female firms, the participation of all minority groups declined in FY99 and FY2000 as compared to the Program Years. The participation of White

Female firms was 9.61 percent for FY99 and 2.66 percent for FY2000 and 1.71 percent in FY2001, compared to 2.31 percent for the Program Years.

Asian Business Enterprises' participation in Construction declined from 8.31 percent for the Program Years to 6.09 percent in FY99 and 0.00 percent in FY2000.

African American firms' participation in Construction went from 16.44 percent for the Program Years to 10.19 percent in FY99, 1.70 percent in FY2000 and 1.28 percent in FY2001.

Hispanic firms' participation declined from 2.93 percent for the Program Years to 1.03 percent in FY99, 0.08 percent in FY2000 and 0.04 percent in FY2001.

Finally, Native American Business Enterprises' participation in Construction went from 3.15 percent for the Program Years to 3.12 percent for FY99, 1.97 percent in FY2000 and 2.18 in FY2001.

Table 6

THE CITY OF CINCINNATI
UTILIZATION IN CONSTRUCTION

PRIMES
(DOLLARS)

FISCAL YEAR	TOTAL \$	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE	MAJORITY
1995	37,340,897	10,476,285	2,625,759	5,915,045	1,459,656	337,409	138,416	26,864,612
1996	32,493,837	8,873,472	1,695,239	5,296,086	273,091	1,151,997	457,059	23,620,365
1997	32,759,219	13,915,881	3,510,952	6,922,810	1,101,596	513,715	1,866,808	18,843,338
1998	48,598,276	14,252,908	4,257,755	5,835,845	1,400,063	2,332,202	427,043	34,345,368
Program Years (FY95-FY98)	151,192,229	47,518,546	12,089,705	23,969,786	4,234,406	4,335,323	2,889,326	103,673,683
1999	43,454,722	10,905,715	1,403,710	3,799,936	446,022	1,342,377	3,913,670	32,549,007
2000	48,977,332	2,040,535	0	833,282	40,360	962,942	203,951	46,936,797
2001	133,573,070	13,185,213	7,619,016	1,643,333	47,442	2,916,484	958,938	120,387,857
Study Period (Program Years through FY2001)	377,197,353	73,650,009	21,112,431	30,246,337	4,768,230	9,557,126	7,965,885	303,547,344
Fort Washington Way	228,494,803	3,526,576	3,526,576	0	0	0	0	224,968,227
Study Period and Fort Washington Way	605,692,156	77,176,585	24,639,007	30,246,337	4,768,230	9,557,126	7,965,885	528,515,571

Source: Griffin & Strong, P.C.

Note: Data for Fort Washington Way cover the period from 1/1/97 to 3/31/2002

Table 7
THE CITY OF CINCINNATI
UTILIZATION IN CONSTRUCTION

SUBCONTRACTORS
(DOLLARS)

FISCAL YEAR	M/WFBE \$	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE	MAJORITY
1995	969,323	311,516	162,834	0	280,283	214,690	2,130,024
1996	324,552	0	209,081	0	0	115,471	1,800
1997	198,628	15,875	128,514	1,875	26,750	25,614	0
1998	1,080,258	141,868	381,078	201,063	115,599	240,650	0
Program Years (FY95-FY98)	2,572,761	469,259	881,507	202,938	422,632	596,425	2,131,824
1999	2,143,048	1,241,470	627,861		12,200	261,517	0
2000	1,097,241	0	0	0	0	1,097,241	838,130
2001	1,394,924	0	66,918	0	0	1,328,006	125,542
Study Period (Program Years through FY2001)	7,207,974	1,710,729	1,576,286	202,938	434,832	3,283,189	3,095,496
Fort Washington Way ⁷³	14,994,603	3,920,411	2,986,733	236,178	3,169,006	4,547,678	0
Study Period and Fort Washington Way	22,202,577	5,631,140	4,563,019	439,116	3,603,838	7,830,867	3,095,496

Source: Griffin & Strong, P.C.

Note: Data for Fort Washington Way cover the period from 1/1/97 to 3/31/2002

⁷³ The cells of the row will not add up to total M/FBES because \$134,597 went to an unidentified Minority not included in Table 7.

Table 8
THE CITY OF CINCINNATI
M/WFBE UTILIZATION IN CONSTRUCTION

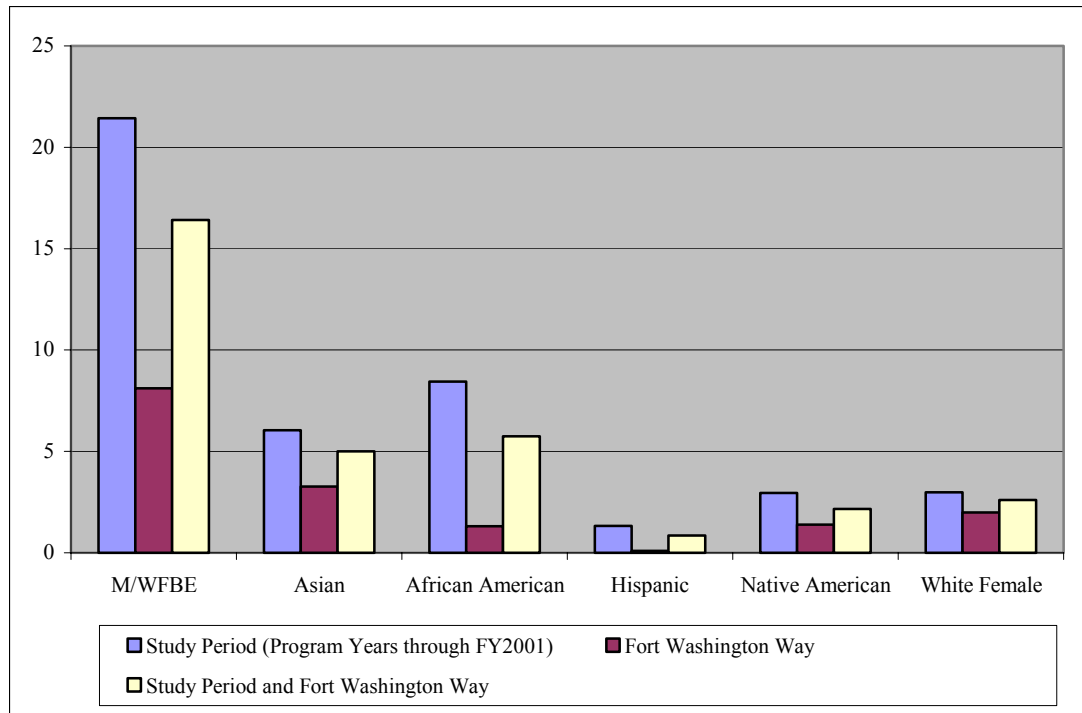
PRIMES AND SUBCONTRACTORS
(DOLLARS AND PERCENTAGES)

FISCAL YEAR	TOTAL \$	M/WFBE (\$)	Percent	ASIAN (\$)	Percent	AFRICAN AMERICAN (\$)	Percent	HISPANIC (\$)	Percent	NATIVE AMERICAN (\$)	Percent	WHITE FEMALE (\$)	Percent
1995	37,340,897	11,445,608	30.65	2,937,275	7.87	6,077,879	16.28	1,459,656	3.91	617,692	1.65	353,106	0.95
1996	32,493,837	9,198,024	28.31	1,695,239	5.22	5,505,167	16.94	273,091	0.84	1,151,997	3.55	572,530	1.76
1997	32,759,219	14,114,509	43.09	3,526,827	10.77	7,051,324	21.52	1,103,471	3.37	540,465	1.65	1,892,422	5.78
1998	48,598,276	15,333,166	31.55	4,399,623	9.05	6,216,923	12.79	1,601,126	3.29	2,447,801	5.04	667,693	1.37
Program Years (FY95-FY98)	151,192,229	50,091,307	33.13	12,558,964	8.31	24,851,293	16.44	4,437,344	2.93	4,757,955	3.15	3,485,751	2.31
1999	43,454,722	13,048,763	30.03	2,645,180	6.09	4,427,797	10.19	446,022	1.03	1,354,577	3.12	4,175,187	9.61
2000	48,977,332	3,137,776	6.41	0	0.00	833,282	1.70	40,360	0.08	962,942	1.97	1,301,192	2.66
2001	133,573,070	14,580,137	10.92	7,619,016	5.70	1,710,251	1.28	47,442	0.04	2,916,484	2.18	2,286,945	1.71
Study Period (Program Years through FY2001)	377,197,353	80,858,007	21.44	22,823,160	6.05	31,822,623	8.44	4,971,168	1.32	9,991,958	2.65	11,249,075	2.98
Fort Washington Way	228,494,803	18,521,179	8.11	7,446,987	3.26	2,986,733	1.31	236,178	0.10	3,169,006	1.39	4,547,678	1.99
Study Period and Fort Washington Way	605,692,156	99,379,162	16.41	30,270,147	5.00	34,809,356	5.75	5,207,346	0.86	13,160,964	2.17	15,796,753	2.61

Source: Griffin & Strong, P.C.

Note: Data for Fort Washington Way cover the period from 1/1/97 to 3/31/2002
Percentages are from different bases, therefore they do not add up.

Construction Utilization Percentages



2. Minority and White Female Business Enterprises' Utilization in Professional Services

M/WFBE participations at the prime level and subcontractor level are displayed in Table 9 and Table 10 respectively. The figures in Table 9 are combined with Table 10 to yield the figures in Table 11, displaying M/WFBE total utilization in Professional Services. The total utilization in percentages for M/WFBE and each minority group is also displayed in Table 11.

The total dollars spent on Professional Services by the City of Cincinnati amounted to \$96.816 million for the Study Period, from 1995 to 2001. Minority and White Female Business Enterprises received a little over \$13 million in Professional Services and their total utilization amounted to \$13.160 million, or 13.59 percent of the total dollars spent by the City of Cincinnati during the Study Period for this procurement category. All minorities and White Female firms were paid \$4.004 million or 9.13 percent of the \$43.848 million spent by the City for Professional Services work performed at Fort Washington Way.

All the minority groups, with the exception of Native American firms, were awarded Professional Services dollars at the prime level for all the years of the Study Period. Overall utilization for minorities amounted to \$10.352 million at the prime level from 1995 to 2001. Each minority group's participation on contracts in this category was in excess of \$500,000, except for Native Americans, who received \$116.868 million at the prime level for the entire Study Period. From January 1, 1997 to March 31, 2002, all payments at Fort Washington Way in Professional Services at the prime level went to a single Majority firm

Table 11 shows that during the Program Years, Minority and White Female Business Enterprises received \$6.407 million, or 19.88 percent of the \$32.227 million spent by the City on Professional Services during that period.

African American Business Enterprises were awarded Professional Services dollars of \$6.196 million (Table 11), or 6.40 percent of the total dollars spent by the City of Cincinnati in this procurement category during the Study Period. They also received \$1.116 million or 2.54 percent of the spending in Professional Services at Fort Washington Way.

The overall utilization of Asian firms amounted to \$2.703 million, or 2.79 percent of the total dollars spent by the City of Cincinnati during the Study Period. These firms received 2.167 million or 4.94 percent of the Professional Services dollars at Fort Washington Way.

Table 11 shows that Hispanic and White Female Business Enterprises received \$1.341 million and \$2.803 million, or 1.38 percent and 2.90 percent of the total dollars, respectively, in Professional Services during the Study Period. They also received payments in the amounts of \$709,537 or 1.62 percent and \$12,024 or 0.03 percent respectively for Professional Services work performed at Fort Washington Way.

Table 9
THE CITY OF CINCINNATI
UTILIZATION IN PROFESSIONAL SERVICES
PRIMES
(DOLLARS)

FISCAL YEAR	TOTAL \$	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE	MAJORITY
1995	5,131,027	386,104	246,213	70,002	27,506	0	42,383	4,744,923
1996	7,965,850	1,634,615	123,559	822,639	374,425	0	313,992	6,331,235
1997	8,924,475	2,085,402	148,345	998,942	45,933	0	892,182	6,839,073
1998	10,206,535	1,349,120	200,333	793,537	31,638	11,183	312,429	8,857,415
Program Years (FY95-FY98)	32,227,887	5,455,241	718,450	2,685,120	479,502	11,183	1,560,986	26,772,646
1999	25,644,478	3,664,250	654,764	1,923,370	87,145	0	998,971	21,980,228
2000	17,236,503	538,747	0	490,243	3,362	4,512	40,630	16,697,756
2001	21,707,224	693,719	54,000	370,766	21,509	101,173	146,271	21,013,505
Study Period (Program Years through FY2001)	96,816,092	10,351,957	1,427,214	5,469,499	591,518	116,868	2,746,858	86,464,135
Fort Washington Way	43,848,052	0	0	0	0	0	0	43,848,052
Study Period and Fort Washington Way	140,664,144	10,351,957	1,427,214	5,469,499	591,518	116,868	2,746,858	130,312,187

Source: Griffin & Strong, P.C.

Table 10
THE CITY OF CINCINNATI
UTILIZATION IN PROFESSIONAL SERVICES

SUBCONTRACTORS
(DOLLARS)

FISCAL YEAR	M/WFBE \$	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE	MAJORITY
1995	56,348	20,000	32,500		0	3,848	22,400
1996	122,441	37,678	70,215	4,548	0	10,000	0
1997	153,170	96,651	39,166	17,353	0		3,420
1998	619,747	468,798	80,029	69,347	0	1,573	2,370
Program Years (FY95-FY98)	951,706	623,127	221,910	91,248	0	15,421	28,190
1999	1,492,740	652,295	505,006	329,489	0	5,950	0
2000	270,177	0	0	235,187	0	34,990	484,803
2001	93,337	0	0	93,337	0	0	149,124
Study Period (Program Years through FY2001)	2,807,960	1,275,422	726,916	749,261	0	56,361	662,117
Fort Washington Way	4,003,912	2,166,796	1,115,555	709,537	0	12,024	0
Study Period and Fort Washington Way	6,811,872	3,442,218	1,842,471	1,458,798	0	68,385	662,117

Source: Griffin & Strong, P.C.

Table 11
THE CITY OF CINCINNATI
M/WFBE UTILIZATION IN PROFESSIONAL SERVICES

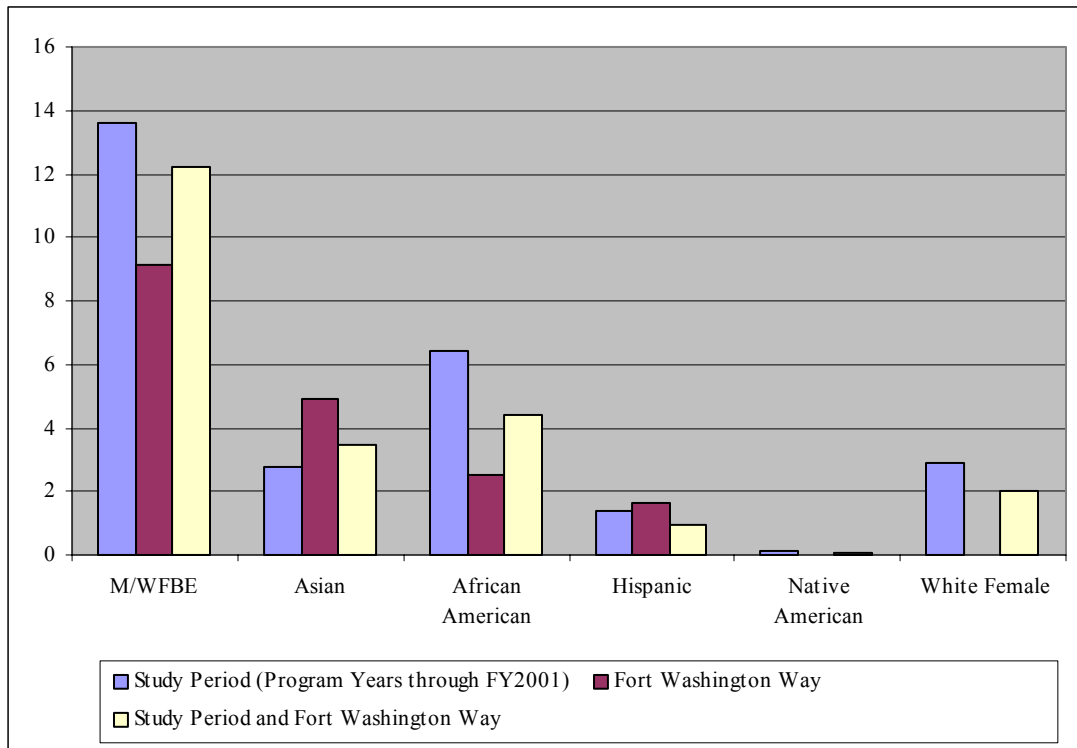
PRIMES AND SUBCONTRACTORS
(DOLLARS AND PERCENTAGES)

FISCAL YEAR	TOTAL \$	M/WFBE (\$)	Percent	ASIAN (\$)	Percent	AFRICAN AMERICAN (\$)	Percent	HISPANIC (\$)	Percent	NATIVE AMERICAN (\$)	Percent	WHITE FEMALE (\$)	Percent
1995	5,131,027	442,452	8.62	266,213	5.19	102,502	2.00	27,506	0.54	0	0.00	46,231	0.90
1996	7,965,850	1,757,056	22.06	161,237	2.02	892,854	11.21	378,973	4.76	0	0.00	323,992	4.07
1997	8,924,475	2,238,572	25.08	244,996	2.75	1,038,108	11.63	63,286	0.71	0	0.00	892,182	10.00
1998	10,206,535	1,968,867	19.29	669,131	6.56	873,566	8.56	100,985	0.99	11,183	0.11	314,002	3.08
Program Years (FY95-FY98)	32,227,887	6,406,947	19.88	1,341,577	4.16	2,907,030	9.02	570,750	1.77	11,183	0.03	1,576,407	4.89
1999	25,644,478	5,156,990	20.11	1,307,059	5.10	2,428,376	9.47	416,634	1.62	0	0.00	1,004,921	3.92
2000	17,236,503	808,924	4.69	0	0.00	490,243	2.84	238,549	1.38	4,512	0.03	75,620	0.44
2001	21,707,224	787,056	3.63	54,000	0.25	370,766	1.71	114,846	0.53	101,173	0.47	146,271	0.67
Study Period (Program Years through FY2001)	96,816,092	13,159,917	13.59	2,702,636	2.79	6,196,415	6.40	1,340,779	1.38	116,868	0.12	2,803,219	2.90
Fort Washington Way	43,848,052	4,003,912	9.13	2,166,796	4.94	1,115,555	2.54	709,537	1.62	0	0.00	12,024	0.03
Study Period and Fort Washington Way	140,664,144	17,163,829	12.20	4,869,432	3.46	6,196,415	4.41	1,340,779	0.95	116,868	0.08	2,803,219	1.99

Source: Griffin & Strong, P.C

Note: Percentages in columns are from different bases, they do not add up.

Professional Services Utilization Percentages



3. Minority and White Female Business Enterprises' Utilization in Supplies/Services

The total spending reviewed by Griffin & Strong; P.C. for the Study Period in Supplies and Services is displayed in Table 12, with conversions to percentages for each year and for each ethnicity, race and gender.

The total dollars spent on Supplies and Services by the City of Cincinnati during the Study Period amounted to \$190.155 million. Minority and White Female businesses received 7.95 percent of the total amount spent in this procurement category.

African American Business Enterprises received the highest amount in Supplies and Services dollars, as compared to the other groups, receiving \$8.541 million, or 4.49 percent, of the total spending in this procurement category during the Study Period.

White Female and Asian firms received awards of \$3.183 million and \$1.330 million, respectively, in Supplies and Services dollars, or 1.67 percent and 0.70 percent, of Supplies and Services awards during the Study Period.

Hispanic and Native American Business Enterprises received \$376,511, or 0.20 percent, and \$1.695 million, or 0.89 percent, of total spending in Supplies and Services, respectively.

The total spending for the Program Years in Supplies and Services amounted to \$99.217 million, with Minority and White Female firms receiving 10.39 percent of that amount.

With the exception of African American and White Female firms, all minority groups experienced a decline in their participation in FY99 when compared with the Program Years.⁷⁴ The participation of African American Business Enterprises increased from 6.07 percent during the Program Years to 8.65 percent during FY99, and White Female firms' participation increased from 1.92 percent during the Program Years to 4.63 percent in FY99.

All minority groups experienced a decline in their participation during FY2000, as compared to the Program Years and FY99. Minority and White Female Business Enterprises' participation in Supplies and Services in FY2000 was 1.69 percent, down from 13.92 percent in 1999 and 10.39 percent during the Program Years.

With the exception of Native Americans and White Females, the other minority groups were not utilized in supplies/services in FY2001. Asian firms received less than \$500 during FY2000 (they received only \$445).

⁷⁴ There was no program in fiscal year 1999.

Table 12
THE CITY OF CINCINNATI
M/WFBE TOTAL UTILIZATION IN SUPPLIES/SERVICES

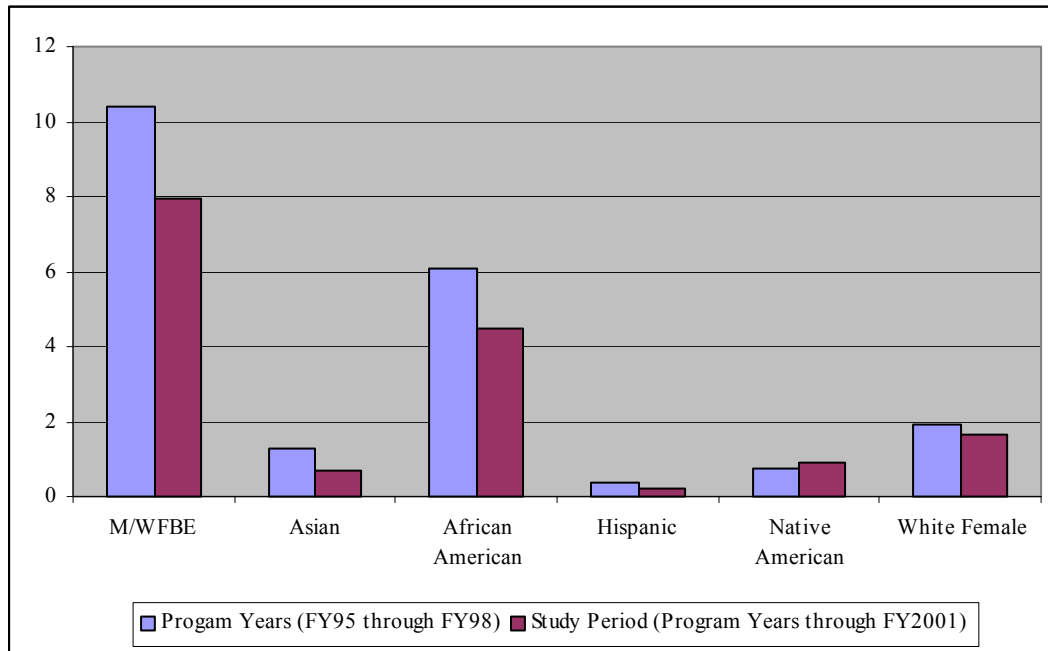
(DOLLARS AND PERCENTAGES)

FISCAL YEAR	TOTAL \$	M/WFBE (\$)	Percent	ASIAN (\$)	Percent	AFRICAN AMERICAN (\$)	Percent	HISPANIC (\$)	Percent	NATIVE AMERICAN (\$)	Percent	WHITE FEMALE (\$)	Percent
1995	23,426,791	2,091,297	8.93	512,157	2.19	799,274	3.41	333,467	1.42	341,156	1.46	105,234	0.45
1996	25,227,597	2,647,738	10.50	300,190	1.19	1,724,605	6.84	20,732	0.08	418,921	1.66	183,280	0.73
1997	25,726,259	3,061,811	11.90	268,800	1.04	1,336,904	5.20	1,921	0.01	970	0.00	1,453,204	5.65
1998	24,836,197	2,512,229	10.12	178,846	0.72	2,158,753	8.69	6,443	0.03	0	0.00	168,177	0.68
Program Years (FY95-FY98)	99,216,844	10,313,075	10.39	1,259,993	1.27	6,019,536	6.07	362,563	0.37	761,047	0.77	1,909,895	1.92
1999	23,907,858	3,327,196	13.92	64,814	0.27	2,067,965	8.65	13,948	0.06	74,354	0.31	1,106,101	4.63
2000	33,138,580	560,256	1.69	4,823	0.01	453,411	1.37	0	0.00	25,110	0.08	76,910	0.23
2001	33,891,718	925,634	2.73	445	0.00	0	0.00	0	0.00	834,934	2.46	90,252	0.27
Study Period (Program Years through FY2001)	190,155,000	15,126,161	7.95	1,330,075	0.70	8,540,912	4.49	376,511	0.20	1,695,445	0.89	3,183,158	1.67

Source: Griffin & Strong, P.C

Note: Percentages in columns are from different bases, they do not add up.

Supplies/Services Utilization Percentages



E. DISPARITY INDICES

This section discusses the disparity analysis and answers the crucial question of whether there is disparity between the utilization of Minority and Female Business Enterprises and their availability in the Cincinnati market place.

One way of answering this question is to assess the existence and extent of disparity by comparing the M/WFBE utilization percentages to the percentage of the total number of firms in the relevant geographic area. The actual disparity is measured by use of a *Disparity Index* ("DI").

The DI is defined as the ratio of the percentage of Minority and White Female Business Enterprise utilization (U) divided by their percentage in the market place (or availability: A)

Let: U =Utilization percentage for the M/WFBE group.
A =Availability percentage for the M/WFBE group.
DI =Disparity Index for the M/WFBE group.
DI = U/A (Utilization divided by Availability).

When the DI is *one* or the utilization percentage equals the availability percentage, there is parity or, put another way, there is no disparity. In situations where there is availability, but no utilization, the corresponding disparity index is *zero*. In cases where there is utilization, but no availability, the resultant disparity index is designated by the symbol " ∞ " (infinity). Finally, in cases where there is neither utilization nor availability, the corresponding disparity index is undefined (division of zero by zero) and designated by a symbol "--" (dash).

The disparity index analysis is carried out for each procurement category included in this study. The disparity index calculations in this study are based on availability estimates derived from the actual bidders' list provided by the City of Cincinnati and the U.S. Census Bureau; 1997 Economic census: Surveys of Minority and Women-Owned Businesses.

1. Minority and White Female Business Enterprises' Disparities in Construction

1.1 Disparity indices based on actual bidders

The disparity indices for Construction displayed in Table 13 are based on actual bidders.

For M/WFBEs, the disparity indices range from 0.66 to a high of 2.23 for the Study Period. A typical Construction disparity index for minority and white female business enterprises from FY1995 to FY1998 was 1.42. M/WFBEs' overall disparity index for the Study Period was 1.13, indicating that utilization rate has been slightly more than the availability estimate in Construction.

Asian Business Enterprises' participation in Construction during the Study Period resulted in a disparity index of 2.63, indicating that these firms were over-utilized in this procurement category relative to their availability. They were also over-utilized at Fort Washington Way with a disparity index of 1.41.

The overall disparity index for African American firms is 1.04 for the Study Period, indicating that this group's participation in Construction resulted in "parity" in the market place. This minority group was under-utilized at Fort Washington Way with a disparity index of 0.16.

The participation of Hispanic firms resulted in an overall DI of 2.34 during the Study Period, suggesting overutilization relative to their availability, but they were under-utilized at Fort Washington Way (DI is 0.18).

Native American firms' participation in construction during the Study Period resulted in a disparity index of 1.84, indicating over-utilization relative to their availability, but with a disparity index of 0.96, they experienced under-utilization at Fort Washington Way.

White Female Business Enterprises experienced under-utilization relative to their availability during the Study Period, with a disparity index of 0.21 and they were also under-utilized at Fort Washington Way in Construction relative to their availability with a disparity index of 0.95.

Table 13
THE CITY OF CINCINNATI

M/WFBE DISPARITY INDEX IN CONSTRUCTION BASED ON BIDDERS

FISCA YEAR	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
1995	1.51	2.77	1.21	9.77	1.37	0.39
1996	1.40	1.84	1.26	2.10	2.93	0.73
1997	2.12	3.79	1.61	8.42	1.36	2.38
1998	1.55	3.19	0.95	8.24	4.16	0.57
Program Years: FY95-FY98	1.63	2.92	1.23	7.34	2.60	0.95
1999	2.23	2.04	1.71	1.37	2.09	4.29
2000	0.66	0.00	0.35	0.15	1.21	1.64
2001	1.12	5.28	0.26	0.07	1.35	1.06
Study Period (Program Years through FY2001)	1.48	2.63	1.04	2.34	1.84	0.21
Fort Washington Way	0.56	1.41	0.16	0.18	0.96	0.95
Study Period and Fort Washington Way	1.13	2.17	0.71	1.53	1.51	1.24

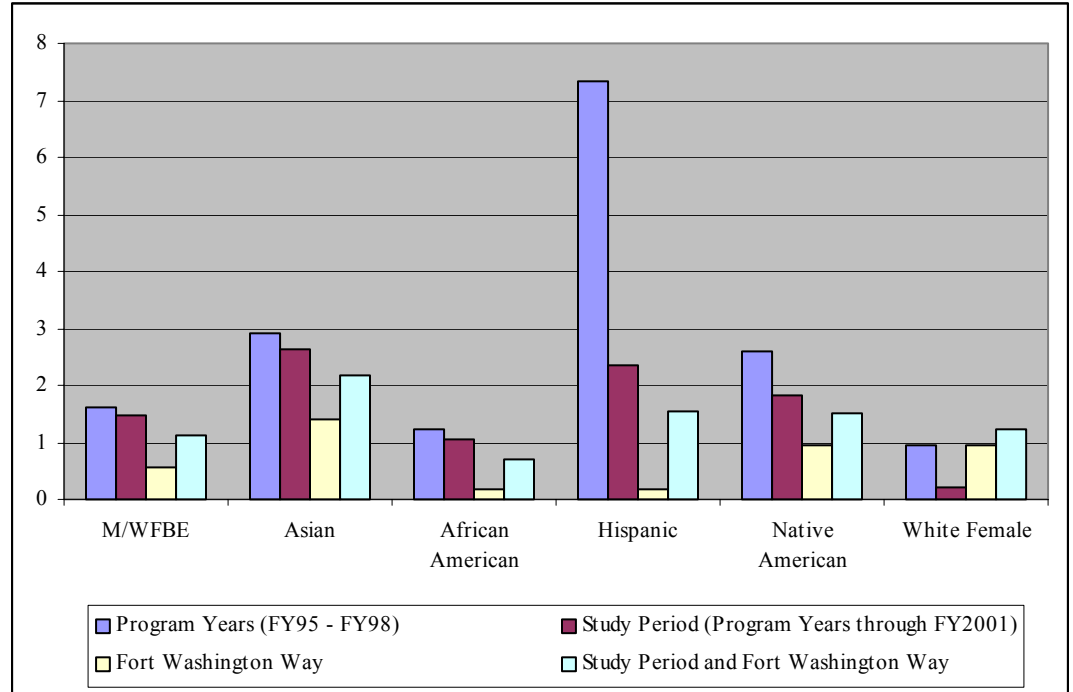
Source: Griffin & Strong, P.C.

Note: 1) Availability Estimates for 2000 have been used for 2001

2) Simple Average of availability estimates of Program years, 1999, and 2000 has been used to compute disparity indices for Fort Washington Way.

3) A Disparity Index is a Utilization percent divided by an Availability percent and disparity indices in the Table above are from different bases; therefore they do not add up by columns or across.

Construction Disparity Indices (From Table 13)



These Disparity Indices (DI) are calculated using availability based on construction bid data.
 DI above 1 indicates over-utilization
 DI equals 1 is parity
 DI below 1 indicates under-utilization

1.2 Disparity indices based on census data

The availability estimates presented in Table 14 are based on number of firms drawn from the 1997 Economic Census survey of Minority and Women-Owned Businesses in Hamilton County, Ohio. We compare the number of firms for each minority group to the number of firms in the universe (total number of firms) for each industry examined in this study (Construction, Professional Services, Supplies/Services).

The disparity indices for M/WFBEs range from 0.35 to a high of 2.35 during the Study Period. M/WFBEs' overall disparity index for the Study Period is 1.17, indicating that utilization rate has been higher than the availability estimate in Construction, but they were under-utilized at Fort Washington Way with a disparity index of 0.44.

The participation of Asian Business Enterprises in Construction during the Study Period resulted in a disparity index of 21.61, indicating that these firms were over-utilized in this procurement category relative to their availability during the Study Period.

The aggregate disparity index for African American firms, at 1.39 for the Study Period, indicates that this group's participation in Construction resulted in over-utilization in the market place.

During the Study Period, the aggregate utilization rate of Hispanic firms has been well above their availability rate resulting in an overall disparity index of 4.71, indicating a significant over-utilization.

Table 14 shows that Native American firms experienced significant over-utilization during each year of the Study Period in construction, with disparity indices ranging from 1.53 to 5.53. Their participation resulted in an overall disparity index of 2.91, indicating over-utilization relative to their availability. They were also over-utilized at Fort Washington Way with a disparity index of 1.52.

White Female Business Enterprises experienced significant under-utilization across the board relative to their availability in construction during the Study Period. Their overall participation resulted in under-utilization with a disparity index of 0.28 for the Study Period and a disparity index of 0.18 at Fort Washington Way, indicating under-utilization.

Table 14
THE CITY OF CINCINNATI

M/WFBE DISPARITY INDEX IN CONSTRUCTION BASED ON CENSUS DATA

FISCAL YEAR	M?WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
1995	1.67	28.09	2.68	13.96	1.82	0.09
1996	1.54	18.63	2.79	3.00	3.90	0.16
1997	2.35	38.45	3.55	12.03	1.81	0.54
1998	1.72	32.33	2.11	11.77	5.53	0.13
Program Years: FY95- FY98	1.81	29.67	2.71	10.48	3.46	0.21
1999	1.64	21.74	1.68	3.67	3.43	0.89
2000	0.35	0.00	0.28	0.29	2.16	0.25
2001	0.60	20.37	0.21	0.13	2.40	0.16
Study Period (Program Years through FY2001)	1.17	21.61	1.39	4.71	2.91	0.28
Fort Washington Way	0.44	11.64	0.22	0.37	1.52	0.18
Study Period and Fort Washington Way	0.90	17.85	0.95	3.07	2.39	0.24

Source: Griffin & Strong, P.C.

Note: A Disparity Index is a Utilization percent divided by an Availability percent and disparity indices in the Table above are from different bases; therefore they do not add up by columns or across.

1.3. Construction Disparity Indices Based on Bid Data Versus Construction Disparity Indices Based on Census Data

A comparison of the construction disparity indices based on bid data and census data are displayed in Table 15. Table 15 clearly shows how the disparity index changes depending on the definition and approach used to estimate availability.

M/WFBEs' overall disparity index for the Study Period (at 0.90 using census data) indicates under-utilization, while the DI (based on availability using actual bidders) indicates almost "parity" or slight over-utilization at 1.13.

Both the disparity indices based on bid data and census data indicate over-utilization for Asian, Hispanic and Native Americans. The over-utilization becomes more significant when the census data are used to estimate availability. With the bid data, the disparity index is 2.17 for Asian, 1.53 for Hispanic and 1.51 for Native American. On the other hand, census data lead to a disparity index of 17.85 for Asian, 3.07 for Hispanic and 2.39 for Native American.

While the availability estimate based on bid data leads to a disparity index of 1.24 or over-utilization for White Female, an availability estimate based on census data leads to a disparity index of 0.24 or significant under-utilization.

Asian Business Enterprises' participation in Construction during the Study Period resulted in a disparity index of 17.85 (census data), indicating a significant over-utilization for this minority group as opposed to a disparity index of 2.17 using bid data for availability estimation.

The availability estimates using census data lead to an overall disparity index of 0.95 for African American for the Study Period, indicating that this group's participation in Construction resulted in under-utilization in the market place. The availability estimation using bid data leads to a disparity index of 0.71, also suggesting under-utilization for this minority group, but less than the disparity index based on census data.

The participation of Hispanic firms resulted in an overall DI of 1.53 during the Study Period, suggesting over-utilization relative to their availability estimate based on bid data. A disparity index based on census data suggests an even greater disparity at 3.07.

Native American firms' participation in construction during the Study Period resulted in a disparity index of 1.51, indicating over-utilization relative to their availability based on bid data compared to a disparity index of 2.39 based on census data.

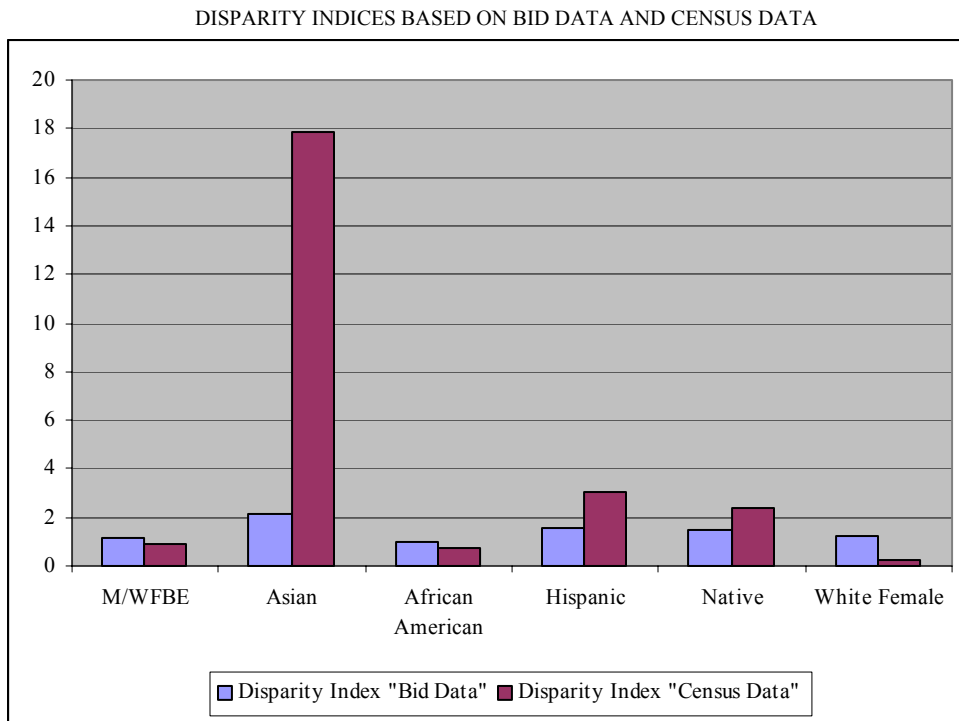
White Female Business Enterprises experienced an over-utilization relative to their availability during the Study Period, with a disparity index of 1.24 based on bid data, but the disparity index for the same minority group (at 0.24 based on census data) suggests a significant under-utilization.

Table 15
The City of Cincinnati
Disparity Indices using Availability Estimates based on Bid data and Census data

CONSTRUCTION (All expenditures including Fort Washington Way)						
	M/WFBE	Asian	African American	Hispanic	Native	White Female
Utilization (U)	16.39	5.00	5.73	0.86	2.17	2.61
Availability Estimates "Bid Data" (A)	14.48	2.30	8.08	0.56	1.44	2.10
Availability Estimates "Census Data" (B)	18.33	0.28	6.07	0.28	0.91	10.79
Disparity Index Based on Bid Data (U/A)	1.13	2.17	0.71	1.53	1.51	1.24
Disparity Index Based on Census Data (U/B)	0.90	17.85	0.95	3.07	2.39	0.24

Source: Griffin & Strong, PC

Note: Availability estimates based on bid data are simple average of availability estimates for "Program Years, FY99 and FY2000"



2. Minority and White Female Business Enterprises' Disparities in Professional Services

As explained above in the discussion of data limitations, availability estimates used to determine disparity indices for Professional Services for this study are based on 1997 Economic Census Data.⁷⁵ The disparity indices for Minority and White Female Business Enterprises ranged from a low of 0.12 to a high of 0.98. While most M/WFBEs were over-utilized during the years of the study period, the resulting aggregate disparity index at 0.60, indicated under-utilization for the Study Period relative to their availability.

Disparity indices for White Female Business Enterprises ranged from 0.02 to 0.57 during the Study Period. Their participation from FY95 through FY2001 resulted in a disparity index of 0.13, indicating that utilization rate fell below availability rate leading to a significant under-utilization relative to their availability. They were not utilized at Fort Washington Way, resulting in a disparity index of zero.

Asian, African American, and Hispanic firms' disparity indices indicate under-utilization, relative to their availability in Professional Services during the Study Period, and Native American and White Female Business Enterprises' indices indicate under-utilization for the same period. These same minority firms were under-utilized at Fort Washington Way with a disparity index of 0.16 for Asian firms, 0.08 for African American firms and 0.05 for Hispanic Business Enterprises.

Native and White Female firms were not utilized at Fort Washington Way and their participation resulted in disparity indices of zero.

Asian, African American and Hispanics indices point to over-utilization during the Program Years and FY99, but their disparity indices point to under-utilization for the subsequent two fiscal years of the Study Period.

⁷⁵ Inference statistics should be made carefully using availability based on census data. One reason among others is that census data used here are surveys of firms not census type data. The availability estimates based on census data could be below or above the true measure of the availability for the minority group in a given industry.

Table 16

THE CITY OF CINCINNATI**M/WFBE DISPARITY INDEX IN PROFESSIONAL SERVICES BASED ON CENSUS DATA**

FISCAL YEAR	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
1995	0.38	2.95	0.74	1.19	0.00	0.05
1996	0.98	1.15	4.15	10.57	0.00	0.23
1997	1.12	1.56	4.31	1.58	0.00	0.57
1998	0.86	3.72	3.17	2.20	2.19	0.18
Program Years (FY95-FY 98)	0.88	2.37	3.34	3.94	0.69	0.28
1999	0.89	2.90	3.51	3.61	0.00	0.22
2000	0.21	0.00	0.13	0.06	0.00	0.02
2001	0.16	0.01	0.08	0.02	0.02	0.03
Study Period (Program Years through FY2001)	0.60	0.12	0.28	0.06	0.01	0.13
Fort Washington Way	0.30	0.16	0.08	0.05	0.00	0.00
Study Period and Fort Washington Way	0.40	0.11	0.14	0.03	0.00	0.06

Source: Griffin & Strong, PC.

Note: A Disparity Index is a Utilization percent divided by an Availability percent and disparity indices in the Table above are from different bases, therefore they do not add up by columns or across.

3. Minority and White Female Business Enterprises' Disparities in Supplies/Services

3.1. Disparity indices based on bid data

The disparity indices for Minority and White Female Business Enterprise displayed in Table 17 are based on availability estimates derived from the pool of actual bidders.

The utilization rate of M/WFBEs was above their availability rate during the Program Years resulting in a disparity index of 1.38, indicating over-utilization. M/WFBEs' overall disparity index is 1.16 in this category for the Study Period.

The participation of Asian firms resulted in a disparity index of 2.08 during the Program Years, but an overall disparity index of 1.08, indicating parity relative to their availability in Supplies and Services for the Study Period.

During the Program Years, African American Business Enterprises' disparity index was 1.25, with an overall disparity index of 1.12 for the Study Period, indicating that the utilization rate was not much different from the availability rate. This overall disparity index for the Study Period suggests almost parity relative to their availability.

The participation of Hispanic Business Enterprises resulted in a disparity index of 0.38 from FY95 to FY2001, with a DI of 1.52 for the Program Years, a DI of 0.07 during FY99, and a DI of 0.00 in FY2000 and FY2001, since there was no utilization for these last two years of the Study Period.

Native American firms' overall disparity index points to over-utilization in Supplies and Services, at 1.58 during the Study Period. These firms experienced significant over-utilization during the first two years of the Program Years, and under-utilization for FY99 and FY2000. This minority group's participation in Supplies and Services in FY99 was 0.39 and 0.14 for FY2000, but they were over-utilized relative to their availability during FY2001 with a disparity index of 4.37.

White Female Business Enterprises' disparity indices were 1.33 during the Program Years and reached a high of 5.78 in FY99. These firms were under-utilized in FY2000 and FY2001. The overall disparity index was 1.52 suggesting an over-utilization relative to their availability during the study period.

Table 17
THE CITY OF CINCINNATI

M/WFBE DISPARITY INDEX IN SUPPLIES/SERVICES USING AVAILABILITY BASED ON BIDDERS

FISCAL YEAR	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
1995	1.19	3.58	0.70	5.93	4.05	0.31
1996	1.40	1.95	1.41	0.34	4.61	0.50
1997	1.58	1.71	1.07	0.03	0.01	3.90
1998	1.35	1.18	1.79	0.11	0.00	0.47
Program Years (FY95-FY 98)	1.38	2.08	1.25	1.52	2.13	1.33
1999	1.58	0.34	1.54	0.07	0.39	5.78
2000	0.40	0.03	0.86	0.00	0.14	0.22
2001	0.64	0.00	0.00	0.00	4.37	0.24
Study Period (Program Years through FY2001)	1.16	1.08	1.12	0.38	1.58	1.52

Source: Griffin & Strong, P.C.

Note: A Disparity Index is a Utilization percent divided by an Availability percent and disparity indices in the Table above are from different bases, therefore they do not add up by columns or across.

3.2. Disparity indices based on census data

The disparity indices for Minority and White Female Business Enterprises displayed in Table 18 are based on availability estimates using the U.S. Bureau of the Census 1997 Economic Census data; surveys of Minority and Women-Owned Businesses in Hamilton County, Ohio.

M/WFBEs' overall disparity index is 0.72 in Supplies/Services indicating under-utilization, but the availability based on bid data leads to a disparity index of 1.16 indicating "parity" or slight over-utilization in this category for the Study Period.

When the pool of bidders was used for availability estimation, the participation of Asian firms resulted in a disparity index of 2.08 during the Program Years, but an overall disparity index of 1.08, indicating parity relative to their availability in Supplies and Services for the Study Period. On the other hand, this minority group's participation resulted in a disparity index of 1.81 for the program years and an overall disparity index of 1.00, indicating true parity when availability was estimated using census data.

African American Business Enterprises' overall disparity index (1.12) for the Study Period suggests almost parity relative to their availability based on bid data. But the disparity index (3.23) based on census data suggests a significant over-utilization.

When disparity indices based on bid data were computed, the participation of Hispanic Business Enterprises resulted in a disparity index of 1.52 for the Program Years, suggesting over-utilization, and an overall disparity index of 0.38 indicating under-utilization. By contrast, when disparity indices were computed using census data, this minority group's disparity index for the program became 2.61 for the program years and 1.41 for the Study Period, indicating over-utilization.

While Native American firms' overall disparity index at 1.58 suggests over-utilization in Supplies and Services with an availability based on bid data, these firms' experienced significant over-utilization using census data for the estimation of the availability. In effect a DI at infinity (∞) indicates an absence of Native American firms in the market place (Hamilton County, Ohio). We are experiencing one of the weaknesses of the use of census data to estimate availability. Based on information from the pool of actual bidders, availability estimates based on census data in Hamilton County, Ohio do not appear to be "**True Values**" of availability of Native American firms in this market place.

When availability estimation based on bid data was performed, the overall disparity index for White Female Business Enterprises at 1.52 suggested a significant over-utilization relative to their availability during the study period. On the other hand, a disparity index based on census data suggested significant under-utilization at 0.19.

Table 18
THE CITY OF CINCINNATI

M/WFBE DISPARITY INDEX IN SUPPLIES/SERVICES USING AVAILABILITY BASED ON CENSUS DATA

FISCAL YEAR	M/WFBE	ASIAN	AFRICAN AMERICAN	HISPANIC	NATIVE AMERICAN	WHITE FEMALE
1995	0.81	3.12	2.45	10.17	∞	0.05
1996	0.95	1.70	4.92	0.59	∞	0.08
1997	1.08	1.49	3.74	0.05	-	0.64
1998	0.92	1.03	6.25	09	-	0.08
Program Years (FY95-FY 98)	0.94	1.81	4.36	2.61	∞	0.22
1999	1.27	0.39	6.22	0.42	∞	0.53
2000	0.15	0.02	0.98	0.00	∞	0.03
2001	0.25	0.00	0.00	0.00	∞	0.03
Study Period (Program Years through FY2001)	0.72	1.00	3.23	1.41	∞	0.19

Source: Griffin & Strong, P.C

Note: (∞) (infinity) means there is utilization but no availability (division of a number by zero)

(-) (Dash) means there is no utilization and no availability (division of zero by zero is not defined)

A Disparity Index is a Utilization percent divided by an Availability percent and

Disparity indices in the Table above are from different bases, therefore they do not add up by columns or across.

III. PURCHASING PRACTICES, POLICIES AND PROCEDURES

The intent of this chapter is to provide a brief overview of the City of Cincinnati's purchasing policies, practices and procedures and to determine the extent to which they may contain provisions that are discriminatory as written, or whether, in practice, some of the provisions have the effect of limiting utilization of minority and female owned businesses.

The study team utilized the services of practitioners with legal, purchasing and contract compliance specialties to conduct a limited review of relevant purchasing laws, policies and procedures for this aspect of the study. In addition, study team members interviewed at least ten members of the City of Cincinnati Purchasing and Contract Compliance Departments, as well as other City officials, regarding application of the policies and procedures in daily life, and their individual experiences with, and observations of, the City's purchasing process.

After examining the City's procurement code and delegation of authority to contract for goods and services, the study team looked at the City's purchasing manuals, the suspended Minority and White Female Business Enterprise (M/WFBE) program, and the recently instituted Small Business Enterprise (SBE) program in an effort to formulate opinions on their relative effectiveness in promoting or deterring minority and female-owned business utilization. To the extent that there is any correlation between the quantitative utilization statistics derived for this study, vendors' anecdotal accounts of disparate treatment, and the City's purchasing practices and procedures, one of the goals of this study is to enhance understanding of the correlation and provide insight to effective remedial measures, should they be required.

A. THE LEGAL AND PROCEDURAL FRAMEWORK FOR PURCHASING

The legal authority for the operation of the Purchasing Department is derived from the Ohio Revised Code, as well as the Cincinnati Municipal Code (hereinafter sometimes referred to as "the Code"), Ordinance No. 426-1992, Section 321. This section of the Code specifically enumerates the duties, guidelines and regulations for the City's purchasing procedures.

The Code designates the Purchasing Division, which is a part of the Department of Finance, as the procurement arm of the City of Cincinnati. Furthermore, Article X of the City Administrative Code charges the Purchasing Division, under the direction and leadership of the City Purchasing Agent, with the purchase of all supplies, materials, equipment, and contractual services required by all agencies of the City, along with the disposition of goods no longer needed by the City.

Section 321 of the Code specifically covers all aspects of the Cincinnati purchasing process, notably including provisions allowing the City's purchasing agents to take into consideration, when determining the lowest and best bid, a bidder's potential for effectively providing equal opportunity to minority and female-owned vendors, as well as to make concerted efforts to afford opportunities to minorities and females for employment. While these provisions are a specific part of the Bid Award section of the Code, during the period in which this disparity study was conducted, there was little indication from interviews or document reviews that these provisions have been aggressively utilized.

In late 1994, the City Purchasing Agent and the City Manager granted approval for decentralizing purchases of \$5,000.00 or less, per commodity code, per vendor, per year. Responsibility for such purchases was delegated to department directors or their designees. Beyond that, the Code designates three tiers, or levels, at which price requirements for goods trigger additional action by the Purchasing Agent. Section 321-13 addresses goods, supplies, services, and construction in excess of \$5,000.00 but not greater than \$25,000.00. Section 321-15 covers those acquisitions from \$25,000.00 to \$100,000.00, and Section 321-17 addresses those in excess of \$100,000.00.

While the Code authorizes the City Purchasing Agent to make the necessary procurement decisions, the City of Cincinnati's Purchasing Manuals (hereinafter sometimes referred to as "the manuals") provide guidance and clarification regarding the administration of the laws and regulations specific to the City's purchasing and contracting functions. The manuals, which are actually a series of about four manuals encompassing guidelines for both internal staff and using staff, provide thorough instruction on integral purchasing processes and procedures, including but not limited to, the selection of commodity classes, procurement definitions, types of purchases, announcements of forthcoming projects, specification guidelines, bid evaluation criteria and procedures, contract award policies, and similar procurement-related matters. All of the City's purchasing manuals are on-line and available to employees through the City's intranet.

The Purchasing Department has eight buyers and a supervising buyer. The buyers are organized into four buying teams, made up of two buyers each, including a senior buyer for each team. The buying staff is supported by technicians, a network administrator, and clerical staff. Overall, the Procurement Department has a considerable depth of experience at the management and staff levels, and many of the buyers have at least ten years experience buying for the City.

B. TYPES OF PURCHASES AND METHODS OF PROCUREMENT

As with many major municipalities, the City of Cincinnati purchases a variety of goods and services that involve almost every industry. These include, but are by no means limited to, automotive goods, construction services and materials, chemicals, electrical services and equipment, communications equipment and hardware, paint, furniture, sewer equipment, office

equipment, and professional services. The Purchasing Department operates using commodity codes and each buyer is assigned a group of commodity codes for which he or she is responsible.

Purchases of goods and services are generated by requirements forwarded to the Purchasing Department, in most cases directly from individual City departments or agencies. There are 24 departments and over 100 other agencies within the City of Cincinnati. The purchasing cycle begins with identification of a need by the department or agency that uses the service or commodity requested. As a general rule, after creating a requisition, the using department or agency passes the same to the Purchasing Department where a buyer is assigned. The buyer assesses the requisition, requests any additional information needed, and moves forward to determine the proper method of procuring the services or items desired. Available methods include, but are not limited to, those listed below.

➤ *Decentralized Purchases* are placed when the items requested by a department or agency cost no more than \$5,000.00 per code, per vendor, per year. Requirements are conveyed through the Purchasing Department's computer system for online approval. This process is aided by use of the Extended Purchasing System (EPS), which is a subsystem of the City's finance system and is driven by a system of commodity codes. Decentralized purchases are not advertised.

➤ *Announced Purchases* are used for acquisitions that are over \$5,000.00, but do not exceed \$25,000.00. Competitive bids are required, although the process for obtaining competitive bids in this category is relatively informal. Requests for bids are announced for a one-week period and posted in the lobby of the Purchasing Department to inform prospective bidders of the opportunity.

➤ *Publicized or Advertised Purchases* are those requiring expenditure of more than \$25,000.00, but not more than \$100,000.00. These are publicized for at least one week and, upon receipt of bids submitted by vendors, an award is made based on the lowest and best responsive and responsible bid criteria.

➤ *Formal Bids* are used for purchases in excess of \$100,000.00 and are awarded through a formal bid letting process. Formal bids are publicized at least two weeks and there is a

formal reading of the bids to the general public at a pre-ordained place and time. These bids are popularly referred to as “3 o’clock bids”. Specifications are provided upon request and once bids are submitted and reviewed, an award is made to the lowest and best responsive and responsible bidder.

➤ *Non-Routine Purchases* include the various other types of purchases the City makes that are not included in the more routine procurements outlined above. These include, but are not limited to, other purchase mechanisms such as single or sole source, annual orders, professional services, and emergency purchases for special circumstances.

➤ ➤ *Single and Sole Source* procurements require written justification from the manufacturer, not just the vendor. The justification must adequately address the uniqueness of the product or situation, or confirm that a particular vendor has the sole authority to distribute the product. The City Purchasing Agent has responsibility for determining the sufficiency of the justification for single and sole source procurements.

➤ ➤ *Annual Orders* are good for a year, although there are comparatively few of these. Because these agreements are used for purposes of securing cost savings on widely used items, a call for requirements is issued approximately five months before a contract expires, so that departments are put on notice to evaluate changes in specifications, usage, technology, and the like, and the procurement can be put out for bid in accordance with procedures outlined in the procurement manual.

➤ ➤ *Professional Service Contracts* are used when unique services or solutions are required. Professional service contracts are placed on the basis of responses to requests for proposals (RFPs) and the evaluation criteria are established within the RFPs. The lowest and best responsive and responsible bidder standard for selection is not used for professional services.

➤ ➤ *Emergency Procurements* up to \$100,000.00 require approval by the City Purchasing Agent. For emergency purchases in excess of \$100,000.00, approval of the Board of Control or a commission may be required. Emergency purchases are

examined to ensure that the need was not generated as a result of an inappropriate or non-emergency reason, such as lack of planning.

Ordinance 321-37 allows the Purchasing Agent discretion to consider bidders with the greatest potential among all bidders for providing equal opportunity to local minority group members and women as the lowest and best bidder, even if their bid was higher than other bidders, as long as the price is not more than three percent to a maximum amount of \$10,000.00 over the lowest bid submitted.

C. A BRIEF SUMMARY OF LEGISLATIVE AND ADMINISTRATIVE ENACTMENTS—Recent Experiences with Race and Gender Conscious and Race and Gender Neutral Programs

In or around 1989, the City of Cincinnati pursued race neutral measures to facilitate minority and female business enterprise subcontractor participation in construction contracts. After pursuing these measures over several months, City officials realized that these measures had failed to increase minority and female business enterprise utilization, so efforts began to more strongly urge and encourage prime construction contractors to voluntarily extend subcontracting opportunities to minority and female subcontractors on City construction contracts. These additional measures again proved unsuccessful in bringing about an increase in minority and female business enterprise utilization.

In 1992, the City Council decided that it would remedy the competitive disadvantage by enacting a new equal business opportunity program. The goal of the City's 1992 equal business opportunity program was to maximize the number of minority and women owned business enterprises that participate in the City of Cincinnati's procurement process, and in prime and subcontract opportunities resulting therefrom.

The City's equal business opportunity program (sometimes referred to herein as the "Minority and White Female Business Enterprise" or "M/WFBE" program) required monitoring and oversight with regard to minority and women business enterprise participation in the City's construction contracts. The program assigned specific responsibilities to the Purchasing Department as well as other departments. The program also identified a Minority Business

Enterprise office with personnel specifically assigned to the required monitoring, as well as to conduct internal investigations of alleged violations, and to take action in accordance with their findings.

The City's employment of race neutral measures in past construction contracts had not proved helpful in preventing discriminatory practices from occurring. While the City encouraged general contractors to utilize minority businesses, they were not required to do so. The lack of such a requirement led to disproportionately low utilization of minority and female contractors by majority prime contractors. The City suspended its equal business opportunity program in 1998, a decision that was based on Croson and subsequent court decisions that made it clear that findings of discrimination upon which race-conscious programs are to be based must be recent. Accordingly, the City suspended its equal business opportunity program pending the results of a disparity study to determine whether the disproportionately low utilization of minority and female business enterprises is the result of unlawful discrimination.

Prior to commencing this study, the City replaced the equal business opportunity program with the Small Business Enterprise (SBE) Program. The purpose of the SBE Program, as stated in the introductory text of the legislation, is "...promotion of the economic welfare of the people of the City of Cincinnati, to mitigate the effects of discrimination against small business enterprises, and the promotion of full and equal business opportunity for all persons doing business with the City of Cincinnati by assisting SBEs to actively participate in the City of Cincinnati's procurement process, and by working to eliminate SBE discrimination in public markets." Monitoring and oversight responsibilities for the SBE Program are in the Office of Contract Compliance.

Besides the more obvious distinction that the M/WFBE program was race and gender conscious while the SBE program is neutral, the current SBE Program does not appear to require as much departmental involvement from Purchasing as the M/WFBE program did. Further, while the M/WFBE Program delegated specific enforcement powers and authority, the SBE Program does not have an enforcement mechanism to ensure that the program is operating in the manner intended, and that it is serving the City by addressing the needs of the individual and business constituents that it was meant to serve.

The difference an enforcement mechanism can make is demonstrated in the City's experience prior to enactment of the M/WFBE program. At that time, prime contractors were not responsive to the City's efforts to simply *encourage* utilization of available minority and women business enterprises. The equal business opportunity M/WFBE program, therefore, became a means by which the City could ensure more extensive use of available minority and women business enterprises in prime contracting and at the lower tiers in subcontracting and subconsulting.

What may be more revealing about the contrast between the two programs than their race and gender stance or enforcement mechanisms is the perception of each program. Various persons interviewed discussed their perceptions of, and experiences with, each program, including the programs' effects on minority and women owned businesses in the Cincinnati community, and ultimately their progress toward achieving their respective ends. Of City officials interviewed for this study, most opined that the M/WFBE program was much more effective in fostering utilization of minority and female owned firms on City contracts than the SBE Program has been. City officials have acknowledged that utilization of minority and female owned business enterprises has been lower since the City of Cincinnati suspended its equal business opportunity program in 1998.⁷⁶

One lead buyer stated that the M/WFBE program was not a good one because the same few companies benefited and other M/WFBEs were bidding too high.⁷⁷ This buyer also expressed the belief that the successful M/WFBE firms were set up as fronts. In this buyer's view, the majority of "set-aside" money went into construction, whereas in non-construction areas, two firms took almost fifty percent of the dollars.⁷⁸ Another buyer expressed that the M/WFBE program was helpful with respect to some commodities, but overall not very useful.⁷⁹ Yet another Purchasing employee expressed the concern that the M/WFBE Program was not enough to bridge the gap in price competition with larger vendors.⁸⁰ The latter comment was supplemented by the view of another buyer who stated the belief that neither the M/WFBE

⁷⁶ PPI Nos. 7, 8, 9, 10

⁷⁷ PPI No. 6

⁷⁸ PPI. No. 6

⁷⁹ PPI No. 1

⁸⁰ PPI No. 5

program, nor the preference program worked because the deck remains stacked against successful performance by smaller companies.⁸¹ In this buyer's view, the smaller companies lack the money and education that are necessary to compete with those companies that are better financed and have more experience with the City's purchasing process.

Reactions to the SBE Program by Purchasing personnel interviewed for this study were mixed. Buyers were fairly consistent in their view that there is very little for Purchasing to do with the SBE Program and that it is the job of Contract Compliance to make it work.⁸² According to one senior level buyer, the SBE Program is not being used yet and the buyer has received no direction on how to identify the SBEs.⁸³ This buyer also said that Purchasing does not do anything with the SBE Program in the areas of supplies and services and that, without goals, it is difficult to see how awards can be made.⁸⁴ Another buyer admitted having read the ordinance and understanding it; nevertheless, this buyer opined that there was nothing for Purchasing to do with the program.⁸⁵ On the Contract Compliance side, it is not disputed that the certification numbers have decreased under the SBE Program, and that the primary reason for the decrease is that minority and female-owned companies do not believe that the certification process truly assists them.⁸⁶

D. PURCHASING PRACTICE AND POLICY CONCERNS—Voices from Inside City Government

Concerns regarding specific practices that interviewees inside City government believe lend themselves to the under-utilization of minority and women owned businesses are discussed below, followed by a discussion of some of the actions interviewees believe could serve to enhance the participation of minority and women-owned businesses. Interspersed throughout are observations and commentaries from the study team that serve to explain or question the impact of various practices and procedures on utilization of minority and female owned businesses.

➤ *Net Worth Provision*

⁸¹ PPI No.4

⁸² PPI No. 1, 2, 3, 6

⁸³ PPI No. 1

⁸⁴ PPI No. 1

⁸⁵ PPI No. 3

⁸⁶ PPI Nos. 8, 9, 10

In placing a \$325,000.00 cap on the allowable net worth of each owner of a company seeking certification under the SBE program, some perceive that the City is placing an unfair and unduly restrictive burden on the ability of numerous small businesses to gain access to the benefits of the program.⁸⁷

➤ *Good Old Boy Network*

What many refer to as the good old boy system of doing business typically involves the tendency on the part of purchasing agents to conduct business, contract with, and solicit bids from contractors with whom they have previously done business; or, for whom the user department has expressed a preference, without regard to fostering fair competition or equal access to opportunities for other potential bidders. This heavy emphasis by purchasing agents and user departments on prior business dealings often results in newer vendors, many of them minority or woman owned companies, being kept from contracting opportunities with the City of Cincinnati.

A great contributor to perpetuation of the good old boy system is the discretion afforded many purchasing agents and user departments that generate requirements. The City of Cincinnati's purchasing policies and procedures allow a great deal of discretion to purchasing agents when bids are solicited. Purchasing Agents have sole discretion over who is notified of upcoming projects and the number of vendors to be notified. City projects are advertised only in *The City Bulletin* and the bulletin board located in the Purchasing Department. Bid Opportunities are circulated more widely only on special occasions, according to one buyer.⁸⁸ This practice permits purchasing agents to control the pool of vendors who are solicited and who ultimately receive contracts.⁸⁹

One minority female employee of the City stated that the good old boy network still exists within the Purchasing organization.⁹⁰ Recalling her own experience shortly after coming to work for the City, she said that her colleagues were not receptive to her presence and carried out a practice that a person should not speak or be heard unless he or she had been with the City for

⁸⁷ PPI No. 9

⁸⁸ PPI No.3

⁸⁹ The authors of this Study have noted that bid information is also available on the City's website, which could be argued to afford as furthering the cause of equal access.

at least ten years.⁹¹ Despite a career that encompassed years of work in both the public and private sectors, this employee said that she had a very difficult time getting her colleagues to communicate with her and recalls having gone home in tears just a few weeks after starting work.

The same employee also expressed her perception that many of the people in procurement are resistant to changes, including those that would make the City's bureaucracy less discouraging to current and prospective vendors.⁹² She also said that it is not uncommon to hear feedback when changes are instituted, questioning why things need to be "fixed."

According to the same employee, one of the more experienced buyers, with considerable influence on the rest of the team, has a negative approach to what he refers to as "the whole SBE thing." A senior buyer with some supervisory responsibility, and who is known to wield considerable influence over the other buyers, made it clear during an interview that he did not know what the SBE program was about and was unaware that buyers' performance evaluations would be tied to efforts at SBE utilization.⁹³ After being provided a copy of the Contract Compliance brochure detailing the SBE program, the same buyer said it was the first time he had ever seen the publication. He also stated that his understanding was that the SBE program is an educational program for vendors, and that he was not aware of how to access the SBE vendor list, which as far as he knew had only about 25 vendors on it.⁹⁴

Other buyers expressed conflicting views about the existence and prevalence of a good old boy network. One buyer insisted the good old boy network is a problem for smaller contractors who cannot get pricing from suppliers; however, another buyer indicated having received more complaints from majority companies in regard to the good old boy network than from minority or woman owned firms.⁹⁵

⁹⁰ PPI No. 7

⁹¹ PPI No. 7

⁹² PPI No. 7

⁹³ PPI No. 6

⁹⁴ PPI No. 6

⁹⁵ PPI Nos. 2, 3

➤ *Stereotypical Attitudes*

Stereotypical attitudes, or the tendency to assume all people who fall into a certain group or category have the same characteristics, were also noted in the Purchasing organization during our research for this section of the study. A senior buyer expressed quite forthrightly his personal reservations about the reliability of minority and female-owned businesses, shortly after responding that he did not believe the departments themselves cared if a supplier was a minority, female, or SBE, as long as they could meet the specifications in a timely manner.⁹⁶ This buyer went on to say that it is a problem when the vendor cannot be reached and that he had only encountered this problem with MBEs. He further stated that he believed the problem with minority business set-asides is that most of them are “fronts.” He indicated that he believed he had complained to Contract Compliance about his concerns, but he did not know how long ago or to whom he complained.⁹⁷ Another warning sign besides not being able to contact the vendor, according to the same senior level buyer, is when the MBE’s price is too high; this signals the buyer to go to the majority-owned vendor.⁹⁸

The same senior level buyer referenced above said that he thinks, but “hopes to God they train them a lot better”, that after some MBEs get business, they start branching out into areas they know nothing about and cannot deliver.⁹⁹ Further, he stated that if the SBE program is to “nourish and teach”, Contract Compliance should try to keep these vendors in the fields in which they have their experience.¹⁰⁰ One MBE, according to this buyer, treats the City as his “bread and butter”, but he acknowledged that the City has had some “good minorities” [as vendors.]¹⁰¹

Another employee related having encountered stereotypical attitudes by end users toward minority vendors when dealing with printing services. This employee cited an occurrence in 1998 when a particular department was seeking printing services and the end user stated that he “knew” that the MBE firm could not do the work because he had already tried another firm in the

⁹⁶ PPI No. 6

⁹⁷ PPI No. 6

⁹⁸ PPI No. 6

⁹⁹ PPI No. 6

¹⁰⁰ PPI No. 6

¹⁰¹ PPI No. 6

past.¹⁰² The same employee also related knowledge of a large construction firm that sponsors a yearly banquet that includes instructions on basic dining etiquette while negotiating over dinner.

➤ *Denial of Opportunity to Bid*

Several people cited instances where companies were denied opportunities to bid on City contracts, or believed they were denied such opportunities. One case that was cited involved a minority owned uniform company that complained of having been denied the opportunity to bid against another firm with a long-standing contract with the City.¹⁰³ Concerns were also raised over the advertising of opportunities to bid with at least one buyer, expressing concern that the City Bulletin is not an effective vehicle for getting the word out on bids, and that the City should continue to look for broader circulation of bids while keeping an eye on advertising costs.¹⁰⁴

Another buyer indicated that it was basically the majority firms that have complained to her about denial of opportunities to bid.¹⁰⁵ One employee voiced concern that the characterization of non-emergency procurements as emergency procurements also means that firms are denied opportunities to bid.¹⁰⁶ The employee also stated that she was aware of a demolition job and knew of a minority-owned company that could do the work, but the job came “disguised” as an emergency and was awarded to a majority-owned contractor.

The same employee referred to above related having been told by several minority owned companies that they were being told that in order to receive awards they had to be certified.¹⁰⁷ While this is true if the companies are bidding as City certified SBEs, this interviewee was of the belief that numerous departments and agencies deny opportunities to small, woman owned and minority businesses as a result of misunderstanding the requirements for bidding. Likewise, this employee said that she had heard from several woman owned vendors that private sector companies are requiring that the WBEs submitting bids be certified by the City before receiving

¹⁰² PPI No. 9

¹⁰³ PPI Nos. 5,

¹⁰⁴ PPI No 3.

¹⁰⁵ PPI No. 2

¹⁰⁶ PPI No. 9

an award from the private sector companies. According to the relator, this tactic is often used as an excuse not to contract with the WBEs.

Another practice considered a regular occurrence, with the result that it denies vendors opportunities to bid, is when a buyer makes an award to the lowest bidder and then follows shortly thereafter with a change order for a substantially larger amount.¹⁰⁸

➤ *Customer/ End User Discrimination*

One buyer stated that majority contractors voice complaints that they are being discriminated against when the preference program results in an award to a minority or female owned firm.¹⁰⁹ Another employee said it is often the case that minority or female owned printing firms run into problems with end users who do not want to change from a proven or established source, or are in a hurry to get something done.¹¹⁰ The same employee stated that she provided lists of minority and female owned firms to engineers, and before they are even looked at, she is told that none can do the work. According to this employee, end users often express preferences for certain vendors and then try to back their way into making the situation work out.

➤ *Unnecessarily Restrictive Specifications*

Several buyers and others expressed concerns over unnecessarily restrictive specifications and the difficulties created when the specifications are too tight. Some complaints have centered on end users favoring particular manufacturers and some involve specifications that are simply overdone.¹¹¹ Some have requested that specification components be broken out so that minority, female, and small businesses can reach them, and still others involve unnecessarily restrictive bonding requirements.¹¹²

¹⁰⁷ PPI No. 9

¹⁰⁸ PPI No. 9

¹⁰⁹ PPI No.2

¹¹⁰ PPI No. 9

¹¹¹ PPI Nos. 3,4,5

¹¹² PPI No. 9

➤ *Bonding*

Several Purchasing employees indicated there is a need for change in the bonding requirements. Some believe assistance is called for because so many items require bid surety. Others believe the requirements for bonding are onerous and unnecessary overall, for supplies and services, and that the requirements should be relaxed for smaller projects.¹¹³

➤ *Use of “Pass Throughs” or “Fronts”*

Several people cited experience with “fronts”, which some referred to interchangeably as “brokers.” According to one buyer, the City’s practice is not to rely on “brokers”, but he believes almost ninety percent of MBE awards go to such companies.¹¹⁴

One Purchasing employee indicated that the department had its suspicions about some MBE firms.¹¹⁵ Another employee related having only seen fronts in the “sense of MBEs”, while another of his colleagues said that fronts have not been a problem since suspension of the M/WFBE Program.¹¹⁶

One interviewee told of a person that came in for certification as an M/WFBE and it was learned that the person did not own the business in question. He worked a clerical job and had been put forward as owner by a trucking company supported by a majority owned firm.¹¹⁷

➤ *Slow Payment and Non-Payment*

At least three interviewees believe that slow payment or non-payment is a problem for suppliers.¹¹⁸

➤ *Price Discrimination by Suppliers*

One buyer acknowledged having heard complaints from minorities about price discrimination by suppliers as an impediment to their ability to competitively bid contracts.¹¹⁹

¹¹³ PPI Nos. 2, 3, 4

¹¹⁴ PPI No. 3

¹¹⁵ PPI No. 5

¹¹⁶ PPI Nos. 4, 2

¹¹⁷ PPI No. 9

Another buyer expressed the opinion that the good old boy network gets in the way of smaller suppliers and keeps them from getting proper pricing from suppliers.¹²⁰ Still others related general knowledge of supplier price discrimination as well as knowledge of price fixing charges against one large supplier that may or may not have involved discrimination.¹²¹

➤ *Other Discriminatory Barriers*

The Purchasing, Contract Compliance, and other personnel interviewed for this section of the study indicated other factors they perceived as barriers affecting the utilization of small, minority and woman owned businesses. One such factor was *collusion*. It was strongly suspected that a senior level buyer was developing, or had developed inappropriate relationships with some vendors and management felt compelled to speak out forcefully on the subject in an effort to curtail the behavior.¹²²

According to one supplier, the City's acceptance of "combination bids", in which contractors across different trades combine their bids to outbid smaller contractors who, standing alone, cannot compete with the lower profit structure of the combined bids, allows majority businesses to manipulate the process to eliminate competition from the small minority and female-owned businesses.¹²³ One interviewee spoke of problems with union *prevailing wage* issues, and another mentioned encountering *double performance* standards by majority firms that claim M/WFBEs get preferential treatment.¹²⁵

➤ *Vendor Performance File*

The City's Purchasing Department maintains a Vendor Performance File (hereinafter sometimes referred to as "the VPF"). The VPF was mentioned in several interviews; however buyers have different perceptions of how it is used. As a consequence, this file could be both a useful tool for Purchasing and an unforgiving indictment of unsuspecting companies. While no

¹¹⁸ PPI Nos. 3, 5, 9

¹¹⁹ PPI No. 1

¹²⁰ PPI No. 3

¹²¹ PPI Nos. 5, 4

¹²² PPI No. 7

¹²³ PPI No. 3

¹²⁴ PPI No. 5

¹²⁵ PPI Nos. 3, 2

specific statute or procedure could be identified to provide guidance on the use of the VPF, the intent of the file seems to have been to create a mechanism for recording the capability or capacity of a vendor to perform. No one provided an instance of when good information had been reported in the VPF. According to one buyer, he uses a “three-strikes” approach to due process when considering entering a supplier in the VPF: a first letter identifying the problem and requesting resolution, followed by a second letter if no resolution is forthcoming, and then contract cancellation. Another buyer indicated having used the VPF, but making a special effort to get all sides of the story before making any final determinations for the file.¹²⁶ Another buyer stated outright that the VPF is generally used as a repository for negative information.¹²⁷ A third buyer confirmed having used the VPF for only two suppliers, both of whom were MBEs: one had defaulted on a surety and the other was not performing on the job, but was still expecting to be paid.¹²⁸

IV. ANALYSIS OF QUALITATIVE EVIDENCE OF DISCRIMINATION: Contemporary Evidence of Discrimination in the City of Cincinnati

This chapter of the study consists of a categorized summary of anecdotal allegations of contemporary acts of discrimination and disparate treatment from business owners in the City. The anecdotal evidence summarized here is intended to identify factors that ultimately affect formation, development, availability and participation of MBEs and WBEs in the City of Cincinnati.

These reported anecdotal accounts should be viewed, in their totality, as perceptions of the procurement process in the City of Cincinnati by MBEs and WBEs. The allegations should neither be relied upon, nor acted upon, on an individual basis, but rather examined for any possible relationship to the quantitative disparities found in this Report to assess whether discrimination against MBEs and WBEs exists in the procurement process.

¹²⁶ PPI No. 4

¹²⁷ PPI No. 3

¹²⁸ PPI No. 1

A. FRAMEWORK AND METHODOLOGY

As with the other portions of this study, the framework for the collection and analysis of anecdotal evidence was developed pursuant to the decision of the United States Supreme Court in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), and subsequent legal decisions on related issues.

The anecdotal accounts being reported were culled from confidential interviews with thirty-five minority and female business owners who reside in or operate their businesses within the City of Cincinnati marketplace. Each interview session and interview report reflects the views and responses of the interviewees. The interview reports are maintained as part of the privileged and confidential files of this firm, and may only be released upon an express written waiver of confidentiality by the interviewee, or disclosed *in camera* under a protective order of a court of competent jurisdiction.

The citations to the interview reports are to specific comments made by the interviewee. These citations are not exhaustive, but are intended to be illustrative of supporting evidence contained within the confidential interview reports. The citations contained in this section should be understood as the following example illustrates:

(I.R.7) refers to "Interview Report No. 7"

The interviewees identified conditions that can be broadly classified into three categories.

- General Market Conditions and Barriers
- Conditions That Adversely Affect the Ability of M/WFBes To Compete
- Conditions That Adversely Affect The Viability And Capacity of M/WFBes.

Within each of these broad categories there exist several specific forms and patterns, which, when looked at in combination, create serious obstacles for M/WFBes. To the extent that such obstacles are detrimental to the efforts of M/WFBes to compete successfully, they may create the perception of discrimination and contribute to the disparity being reported in this Report.

It is important to note that some of the incidents cited in the anecdotal accounts related below occurred within the Cincinnati metropolitan area, but they involved entities other than the City of Cincinnati and, therefore, have not been attributed to the City of Cincinnati for purposes of this study.

B. GENERAL MARKET CONDITIONS AND BARRIERS

An overview of the responses of several M/WFBEs indicates repeated instances of both specific and non-specific barriers that often prevent minority firms from entering and competing in the marketplace. Further, these responses appear to reflect a wide range of problems facing minority and women-owned firms, including:

- Limited Bid Opportunities
- Customer or end-user discrimination
- Bonding
- Financing
- Slow pay and non-pay
- Double standards in performance
- Bid shopping
- Bid manipulation and collusion by majority firms
- Lack of access to contracts
- Stereotypical attitudes on the part of customers and/or buyers
- Predatory business practices
- Use of Pass Throughs or Fronts

In the aggregate, typical M/WFBE responses reflect, at a minimum, the perception of pervasive and persistent patterns of discrimination in the City of Cincinnati marketplace.

1. Limited Bid Opportunities

The consensus among most interviewees was that there are far too many projects of major size or status that simply are not let for bid to the general public. There were numerous complaints, primarily from those in the construction industry, that bid packages, particularly on major projects, are too large and tend to exclude M/WFBEs by their sheer size. The

prequalification program is another means identified by at least one interviewee as a way to exclude M/WFBEs from the bid process. (I.R. 28) Almost all interviewees who received invitations to bid from the City of Cincinnati reported receiving bids that were completely unrelated to the services they perform. Others said that they received no invitations to bid at all.

Several persons that were interviewed discussed experiencing difficulty finding a way to get the “foot in the door” in order to do business with City departments. Most expressed the sentiment that obstacles to successful development of a minority and female supplier base are deliberately placed by non-minority individuals with the power or positions that enable them to do so.

2. Customer or End-User Discrimination

Many of those interviewed believe that political or insider contacts are necessary to enhance one's ability to receive increased opportunities for bid awards. An MBE construction vendor reported submitting the winning bids on several different occasions, which still did not result in his company being awarded the resultant contracts. (I.R. 1) Another MBE construction vendor reported outright rejection of his bids by the City of Cincinnati, even though his company had not been debarred, reportedly after a dispute with a City inspector, which was still unresolved at the time of the interview. (I.R. 4) Generally, most of those interviewed felt, and apparently accepted as an unfortunate fact, that many departments within City government are unwilling to formulate new relationships even if the new relationships are more economical. One WBE construction interviewee stated that after she rebuffed a sexual advance from a Cincinnati Metropolitan Housing Authority (CMHA) Inspector she received no further work from CMHA. (I.R. 12) Another WBE construction interviewee complained about how restrictive consultants are about using "new" vendors. (I.R. 23) A M/WFBE interviewee reported that a long-standing relationship with Children's Hospital of Cincinnati was terminated as a result of suspension of the Equal Business Opportunity Program. (I.R. 35).

Note: Accounts involving entities other than the City of Cincinnati have not been attributed to the City of Cincinnati for purposes of this study.

3. Bonding

The bonding process appears to be more problematic for MBEs than WBEs. The most common complaint was the cost associated with the bonding process. One MBE contractor responded that, "some bonding agencies will not market to surety writers". (I.R. 5) This individual obtained his bonding outside the City of Cincinnati. Another MBE contractor responded that his bonding company has disallowed his bid on several occasions. (I.R. 1) An MBE interviewee indicated his bonding situation has somewhat improved from an experience he had in the 1980's when a bonding agent assured him that if he were granted a bid bond, the performance bond was automatic. After the MBE had obtained the bid bond and had been awarded the contract, the bonding agent did not provide the performance bond. (I.R. 24) Every interviewee who offered a specific complaint about the bonding process believed the process inhibited his or her successful operation within the City of Cincinnati marketplace.

4. Financing

Capitalization is an often-cited market barrier for M/WFBEs. The M/WFBEs in the construction industry appeared to have been most affected by this barrier. An MBE contractor stated that it is "very difficult to qualify for working capital if you are African American. You never have the necessary prerequisites, and they never give you what [amount of money] you need. They tend to misdirect us; lead us on to believe we need fringe items which rapidly drain our resources." (I.R. 5) An MBE contractor complained that he is always required to personally guarantee every business purchase he has ever made. (I.R. 31) Other complaints from MBEs include requirements to collateralize loans at ratios over and above standard practice in the industry, and that the financing process is too difficult.

5. Slow Pay

MBEs, particularly in the construction industry, indicated that they suffer greatly due to slow payment, and sometimes non-payment, from those by whom they are employed. Nearly all of the interviewees commented that the City of Cincinnati is an especially slow-paying entity. Those interviewed generally described the payment process as taking anywhere between four and twelve months. Two vendors described situation which took more than a year to obtain payment. (I.R.s 4, 35)

One contractor that was interviewed described the paperwork associated with City work as "madness" in order to get paid. (I.R. 7). Another MBE contractor stated that a ploy often used by contractors to extend the payment process is when the contractor creates a change order at the end of the job, which can allow retention monies and final payment to be held by the contractor for what seems like an eternity. (I.R. 1).

With respect to the construction industry in particular, it was stressed by a WBE contractor that, "large contractors are the worst offenders for payment. They pay when they feel like it." (I.R. 16) The view was also expressed that "government entities are the worst about on time or reasonable payment schedules." (I.R. 24) An MBE contractor observed that in his business, he is required to expend substantial sums for permits and salaries, but receives no consideration from the City when he submits his bill for payment. He said that he routinely waits 4-6 months for payment upon completion of his work. (I.R. 18).

6. Double Performance Standards

Nearly all of the MBE interviewees, and some of the WBEs, reported having experienced double standards in their performance. Double performance standards are generally described as higher performance expectations and how the work of minority firms is inequitably scrutinized. An MBE contractor stated, "MBE work must be exemplary. Majority trades can get away with inferior quality work." "Inspections tend to be more detailed. Schedules tend to be more compressed, and thus parameters for mistakes are increased." (I.R. 8).

An MBE architecture firm agreed, "MBEs must be better at what they do." (I.R. 9). A WBE contractor stated, "I must perform better and know more than any man in the business." (I.R. 12). The same WBE reported one instance where she was required to redo a portion of her work, which was a replica of another majority contractor's work on site. Most interviewees agreed their work is more closely scrutinized than that of majority companies performing the same or similar duties and expressed the opinion that the practice occurs quite frequently.

7. Lack of Access to Contracts

Taken generally from the interviews there is a general perception among many that inside contacts or an inside "track" is very much needed to compete on a level that will allow an MBE to become successful in contracting with the City of Cincinnati.

8. Bid Manipulation and Collusion by Majority Firms

Several of the thirty-five persons that were interviewed said that majority companies were willing to go to extraordinary lengths to exclude MBEs from the marketplace.

The owner of an MBE construction company related that his firm was low bidder on a City contract; however the award of the contract was disallowed due to the bid's allegedly exceeding the budget. The bid was subsequently awarded to a competitor, the next lowest bidder, without a re-bid. (I.R. 1). Three MBE contractors reported that they have specific knowledge of situations where majority contractors have conspired to "low ball" a bid to exclude MBEs from the possibility of being awarded a contract. (I.R.s 4, 5, 24).

A WBE reported instances in which her competitors circumvented rules governed by statute to facilitate contract awards, which in many cases may not otherwise have been affordable to administer. (I.R. 20) Another MBE reported having bid and won a Hamilton County contract after which the County cut a portion of the contract, which as it happens, the MBE bid lower than its next highest competitor. At that point, the MBE's next highest competitor became low bidder and was awarded the contract. (I.R. 22).

Note: As with other accounts involving entities other than the City of Cincinnati, accounts of discrimination involving Hamilton County have not been attributed to the City of Cincinnati for purposes of this study.

9. Stereotypical Attitudes

Stereotypical attitudes on the part of customers or buyers can create a major barrier to successful incorporation of M/WFBEs into the marketplace. M/WFBEs perceive that customers and buyers generally lack confidence in their ability to competently complete contracts they are awarded, and an even lower expectation that M/WFBEs will perform adequately.

An MBE contractor stated, "Customers naturally expect a lower quality of work from MBEs." (I.R. 14). A W/FBE contractor stated that she always considers her audience before she sends a representative to a meeting, in an attempt to negate some of the stereotypical attitudes before they can occur. (I.R. 7). Another W/FBE contractor said that her largest obstacle, as it relates to stereotypical attitudes, is when buyers signal that they think only big companies can do big jobs. (I.R. 10).

Many of the MBEs that were interviewed expressed their belief that African-American companies are scrutinized more closely and tend to overcompensate with quality. One expressed the belief that there are more stereotypical attitudes existing about the black man than any other race, with the single worst perception being that black men are unable to do satisfactory work. (I.R. 32)

10. Predatory Business Practices

Some of the occurrences highlighted under bid manipulation and collusion apply to the category of predatory business practices. Actions that are specifically designed to eliminate or impair the ability of M/WFBEs to compete, to put them out of business altogether, may be the ultimate market barrier for M/WFBEs in the City of Cincinnati marketplace. Many interviewees expressed the belief that the current successful attacks on affirmative action policies embolden majority companies to reject minority and female-owned businesses in the City of Cincinnati marketplace. (I.R. 2, 5, 8, 10, 15, 18, 22, 23, 24).

11. Bid Shopping

Bid shopping occurs most often in the construction industry. A prime general contractor shares with a "preferred" subcontractor the lowest price bid and offers the "preferred" subcontractor the opportunity to match or beat the price quoted. Bid shopping belies the spirit of the award-to-the-lowest-bidder. Those interviewed believe that bid shopping "pervades the construction industry" (I.R. 5), "is an occupational hazard in the construction industry" (I.R.4), "a common practice" (I.R. 7, 23), "happens all the time (I.R. 24).

In speaking with MBEs, in particular, not one felt sufficiently empowered to attack the barriers to contracting. Some had suggestions for solutions to counter the problem, but no one had any plans to submit their recommendations to any person or entity for further consideration.

12. Use of Pass-Throughs or Fronts

Numerous M/WFBE interviewees reported knowledge of companies functioning as "fronts" for majority companies. One example of a front is a firm that purports to be M/WFBE owned, however is controlled and operated by a majority company. Another example is when a majority company utilizes an MBE or WBE, in name only, to fulfill the majority company's MBE and WBE participation on a job, in exchange for a small percentage of the total contract awarded.

Approximately one-third of those interviewed acknowledged having been asked to act as either a pass-through or a front for a majority company. Most regarded the notion of fronts and pass-throughs negatively, because they felt that it minimized the hard work and struggle the M/WFBE had undergone to maintain the operation of their businesses.

One MBE construction interviewee referred to pass-throughs and fronts as "prostitutes that pollute the industry". (I.R. 5) A recent incident was reported by an MBE construction interviewee who was listed as a subcontractor of a large general contracting firm on the Paul Brown Stadium. A contract amount was listed as being awarded to his company in an amount at least five times greater than the actual amount of his contract. Although he notified the county and the contractor of the incorrect dollar figure, it continues to be listed incorrectly. (I.R. 31).

Note: As with other accounts involving entities other than the City of Cincinnati, accounts of discrimination involving Hamilton County have not been attributed to the City of Cincinnati for purposes of this study.

C. REMEDIES—Voices from Outside City Government

This final section addresses potential remedies to some of the disparities and barriers discussed in this analysis. All of the interviewees were asked what remedies were necessary to

increase the availability and participation of M/WFBEs in the City of Cincinnati marketplace. Listed below are a few of the suggestions that were received:

1. The certification process is far too invasive and should be streamlined.
2. Contract Compliance should take a proactive approach to M/WFBE participation and track M/WFBE participation on jobs by visiting sites and counting heads. Contract Compliance should closely track procurement dollars as well.
3. The bid process could be improved in the following ways:
 - a. Notice requirements for bids could be changed to insure dissemination to more vendors.
 - b. The lowest responsible bid should win.
 - c. The City should give consideration to the establishment of a price control board.
 - d. The bid process should be restructured to be fairer to all bidders.
 - e. Larger projects could be broken down to smaller bid packages.
4. Paperwork could be streamlined.
5. The payment process could be streamlined and simplified so that it is possible to track payments through the system.
6. Set asides and preferences are needed to incorporate M/WFBEs into the marketplace.
7. New business strategies are needed to incorporate more businesses into the system, and create a greater likelihood that work will be spread around.
8. Business districts need to be strengthened.

9. More trade shows and expos are needed to showcase vendors' areas of expertise.
10. Preparation and distribution of a comprehensive vendor list at least once a year.
11. Employees whose jobs require that they deal with businesses should be replaced if they do not understand how business works.
12. People in power in both administrative municipal positions and majority companies could use diversity training before doing business with M/WFBEs.
13. A program of assistance to obtain and retain financing and bonding for M/WFBEs and small business could be very beneficial.
14. A change in the bonding threshold would incorporate more vendors.
15. Joint ventures are beneficial to small businesses and should generally be encouraged.
16. Incentives should be provided for the incorporation of M/WFBEs into majority companies' contracts with the City.

V. PUBLIC HEARING REPORT AND FINDINGS

The Administrative Public Hearing for the City of Cincinnati was convened February 27, 2001 at 6:00 p.m. in an auditorium facility known as the TechSolve Center, which is located at 1111 Edison Drive, Cincinnati, Ohio 45216.

Attorney Rodney K. Strong presided as the Administrative Hearing Officer, as sworn testimony was taken before Mr. David Chapman, Esq., who represented the City of Cincinnati's Department of the City Manager, and the Department of Contract Compliance.

The first speaker of the evening was Mr. David Chapman who explained the purpose for the administrative public hearing for the Disparity Study for the City of Cincinnati. Included within Mr. Chapman's explanation were general comments regarding the focus of the hearing and the type of comments being sought.

Mr. Chapman then introduced Attorney Strong who began by explaining Griffin & Strong, P.C.'s role in conducting the Disparity Study for the City of Cincinnati. Attorney Strong provided greater detail as to the types of testimony that would have relevance to the study, the purpose the testimony would serve, and how it would be incorporated in the study.

Introductions and general explanations having been completed, Attorney Strong proceeded to take testimony from six (6) witnesses, listed below, all business owners who have operated their businesses for a substantial period of time.

1. Ms. Stacy A. Smith, President, Certified Medical Affiliates, a medical supply company.
2. Mr. Tyrone Stuckey, President/Owner, TYS Construction
3. Ms. Marty Stouffer-Heis, Owner, Construction Co.
4. Mr. Thomas Walton - Sakal Technologies - computer consultants.
5. Mr. Henry Wilson, Owner, Wilson Associates & Engineers.
6. Mr. Ben Lowe, Jr. - Lowe Engineering

Several themes involving disparate treatment and barriers recurred throughout the witnesses' testimony.

- Denial of opportunities to bid
- Customer/end-user Preferences
- Limited Financing
- Problems obtaining Bonds
- Slow Pay
- Predatory business practices
- Stereotypical attitudes

A. DENIAL OF OPPORTUNITY TO BID

Ms. Stacy Smith, an African American female, testified that she has become something of an activist on behalf of MBEs and WBEs. Ms Smith founded *True MBE and WBE Watchdogs*. This organization was established to monitor the progress of MBEs and WBEs in their attempts to nurture their businesses within the City of Cincinnati marketplace. She noted a sharp decline in business opportunities for MBEs and WBEs since the suspension of the Equal Business Opportunity Program (EBOP).

Ms. Smith related that her term contract with the City of Cincinnati was put on hold because EBOP was being suspended, and her four-year relationship with Children's Hospital of Cincinnati was terminated when it was rumored that EBOP would be suspended.

Note: Accounts of discrimination involving entities other than the City of Cincinnati have not been attributed to the City of Cincinnati for purposes of this study.

Mr. Tyrone Stuckey, an African American male, who is President of TYS Construction Company, testified with regard to the City of Cincinnati's failure to support MBE business efforts, and that MBE businesses are discouraged from participating in the market. Mr. Stuckey also testified that MBEs are purposely excluded from work opportunities, a prime example being the requirement to utilize prevailing wages on construction projects requiring use of unions that have minimal minority membership.

The required use of prevailing wages inflates the cost of a project, and further inhibits the ability of MBEs and WBEs to compete at a higher level. Mr. Stuckey specifically noted the intense efforts of the Associated General Contractors (AGC) in filing lawsuits across the nation challenging MBE and WBE set asides and preference programs as unconstitutional. The witness described himself and his business as successful, and well established in the community. According to his testimony, he has either the fourth or fifth largest MBE company in the City, but was awarded no work on the mega-million dollar Paul Brown Stadium. *Note: As with other accounts involving entities other than the City of Cincinnati, accounts of discrimination involving Hamilton County have not been attributed to the City of Cincinnati for purposes of this study.*

Ms. Stouffer-Heis, who is female, and part Native-American, testified there was confusion surrounding ownership of Paul Brown Stadium and from whom bid packages could be obtained, and to whom bids should be directed. She added that rules for MBEs and WBEs are constantly changing, which provides another source of frustration. It serves to create additional confusion regarding what M/WFBE companies must do to derive a benefit from the programs designed to aid their business efforts.

Mr. Henry Wilson, an African American and owner of Wilson & Associates Engineers, provided testimony about the negative effect suspension of EBOP has had on M/WFBE business. He noted that he was awarded a contract for the Fort Washington Way Project, but only after a public works official insisted his company be considered.

Mr. Wilson stressed that the City should require minority participation. Prior to the institution of the SBE program, Mr. Wilson testified that it was very helpful to be certified as a MBE by the City. He added that majority businesses would often check to see if a company is certified, and if minority participation is encouraged. He stated that his current assets exceed the limitations of the current SBE program, and he is no longer able to benefit from his minority status. Mr. Wilson's believes that if there is no minority participation required, majority companies are not inclined to voluntarily utilize minority companies.

B. CUSTOMER OR END USER PREFERENCES

All of the witnesses agreed that the City of Cincinnati has well-established preferences with which they do business. The witnesses' concerns over those preferences were expressed at a variety of levels.

Ms. Smith related that she was awarded a \$5,000 term supply contract that generated a \$1,502.52 order from the City. The order was subsequently pared down to \$660.00. Ms. Smith has since received no further orders pursuant to that particular term contract, and has been awarded no further term contracts although she performed as requested.

Mr. Wilson stated that he was awarded a term contract with Neighborhood Development. He has received only the barest opportunities to perform upon any portion of his term contract. The size of the original term contract has decreased in size from \$25,000 to \$10,000.

Mr. Wilson further commented that the City "has special people that they go to all the time."

Mr. Stuckey related that he was unsuccessful as were most MBEs, in being awarded any portion of the Paul Brown Stadium. Mr. Stucky did, however, state that he was awarded seven different projects on Fort Washington Way.

Ms. Stouffer-Heis testified about an abundance of work in the City, but added that MBEs are excluded from participation largely because the City does nothing to support MBE participation. She testified that her belief is that the City's commitment to M/WFBEs has been downgraded from "guidelines and goals" to "only a good faith effort."

Mr. Thomas Walton, an African American male and owner of Sakal Technologies, stated that he has been encouraged to bid projects, and to make presentations however treated disrespectfully. As an example, he cited being required to wait 30-40 minutes before being allowed to make his presentation. He said that in one instance he met with the Chief of a division of the Cincinnati Police who, after having waited 40 minutes, requested that he return in two weeks with additional information. Upon Mr. Walton's return, a brief meeting was held, at which time he was informed of the department's decision to award the contract to someone else.

In response to a Request for Proposal (RFP) from Neighborhood Services, Mr. Walton said that he was short-listed for a contract, but was subsequently informed the contract requirements had been restructured and would be awarded to another company.

Mr. Wilson stated that consultants for the City are not inclined to use M/WFBEs, and further restrict M/WFBE access to business opportunities as a result of their unwillingness to consider M/WFBEs on City projects within their control. Mr. Wilson suggested that consultants for the City should be subject to scrutiny of their use, or failure to use, M/WFBEs.

Mr. Wilson also testified that personnel in City departmental offices rarely, if at all, return telephone calls in response to inquiries made regarding ongoing City projects under their control.

Mr. Ben Lowe, Jr., an African American and President of Lowe Engineering, stated that he survives on work outside the City of Cincinnati because, in his opinion, the City does not support minority business. He cited two individuals in particular in the Public Works Department who are very uncooperative with MBEs.

C. LIMITED FINANCING

Ms. Smith testified about her efforts to prompt and assist City of Cincinnati officials to establish a Micro Loan program, designed to provide a source of financing for M/WFBEs. She explained how she solicited political support for the idea, and provided input regarding the criteria to be used in determining what was acceptable for applicant approval. Subsequent to her efforts on behalf of the program, she testified that City officials opted, behind closed doors and without consideration for the needs expressed by business owners, to change the criteria for acceptance to include requirements that made it more difficult for M/WFBEs to qualify.

D. BONDING

Although not a great deal was said on the issue of bonding, Mr. Stuckey and Ms. Stouffer-Heis, both of whom are in the construction industry, did comment upon limitations on their ability to obtain sufficient bonding.

Mr. Stuckey only indirectly referenced bonding through his comments regarding general practices by majority contractors designed to frustrate the progress of MBEs.

Ms. Stouffer-Heis commented in specific reference to the concrete package on the Reds Stadium valued at \$48,000,000.00. Although the project was reduced to five packages, it could not be bonded by MBEs, even at \$10,000,000.00 per package.

Note: Accounts involving entities other than the City of Cincinnati have not been attributed to the City of Cincinnati for purposes of this study.

E. SLOW PAY

The difficulties associated with the process of receiving payment for services rendered was discussed by the first two witnesses, Ms. Smith and Mr. Stuckey.

Ms. Smith's comments were brief, but pointed. She related her final experience with Children's Hospital of Cincinnati as an unpleasant occurrence. After supplying goods, she was forced to wait more than a year to receive payment for the order.

Note: Accounts involving entities other than the City of Cincinnati have not been attributed to the City of Cincinnati for purposes of this study.

Mr. Stuckey's comments were expressed in far more general terms. He described the "requisition submission" and "retainage" processes as devices used to slow growth and force MBEs into bankruptcy. He also stated that majority contractors utilize back charges and liquidated damages provisions in contracts as a means to keep MBEs "handcuffed and shackled" to the job.

F. PREDATORY BUSINESS PRACTICES

Predatory business practices were discussed by only one of the witnesses, Mr. Stuckey. His opinion is that governmental entities purposely try to cripple MBEs financially to either put them out of business or keep them non-competitive. Mr. Stuckey's references, in the previous section, to retainage and submission of requisitions in the construction subcontractor's contract, are examples of predatory practices. Mr. Stuckey described use of such practices as one more device used to "slow growth" and "force MBEs into bankruptcy".

G. STEREOTYPICAL ATTITUDES

Mr. Wilson reiterated his experience with claims by many majority companies that they cannot find qualified minority businesses, and called those claims "excuses". Mr. Wilson stressed there are plenty of qualified minority businesses in the City of Cincinnati. Mr. Wilson also expressed a desire that individuals who determine whether and how much business minority businesses are awarded should receive diversity training. This would serve to increase their understanding, and dispel many of the myths about minorities.

H. SUMMARY OF RECOMMENDATIONS FROM HEARING

There was a consensus among the witnesses that without strong support from City government, there is no compulsion for majority companies to include MBEs and W/FBEs in

their stream of commerce. They expressed concern that, if the City of Cincinnati does not institute a program with "teeth," M/WFBEs will suffer a serious threat to their survival.

Ms. Smith felt a program is needed to include MBEs and to generate business for them, and that majority companies must be coerced to allow MBEs into the process.

Mr. Stuckey said the City needs to put much stronger support behind MBEs and WBEs to insure their survival.

Ms. Stouffer-Heis said that the SBE program does not promote MBE growth, that a stronger program is required, and that majority companies will not use minorities if they are not required.

Mr. Wilson stated that the playing field is not level, and that the City should require minority participation on all projects.

Mr. Lowe expressed the belief that the SBE Program has not had a positive effect on MBE's business, and that, in fact, it has had quite the opposite effect, resulting in less business for M/WFBEs. He also felt that, without coercion, majority companies have no interest in doing business with minorities.

There was additional commentary by several witnesses that the SBE program's guidelines actually exclude those whose interests it should actually protect.

The hearing was adjourned at 8:05 p.m.

VI. DISPARITY STUDY SUMMARY AND CONCLUSION

The foregoing study produced significant data that suggest that disparities in purchasing and contracting, as between majority or white-owned firms and minority and female-owned firms, continue to exist in the City of Cincinnati. Particularly revealing was the level of participation that was recorded in fiscal year 2000. The data reveals a substantial contrast between the dollars spent by the City of Cincinnati with minority and female owned firms during the Program Years and the dollars spent with minority and female owned businesses, in 2000, with the race neutral small business enterprise program. This suggests that absent initiatives designed to ensure equal business opportunities, barriers exist that prevent minority and female owned businesses from participating in contracting and procurement with the City of Cincinnati commensurate with their availability in the market place.

Consistent with legal trends that are developing, a narrow approach to measuring availability of minority and female owned businesses was utilized in this study showing an aggregate over-utilization of such firms by the City of Cincinnati for the years under review, 1995 to 2001. This is important should the City of Cincinnati seek to adopt race or gender based remedial measures. However, measuring availability only through bid data removes from the equation market census data, and the vendor list for the City of Cincinnati from which additional qualified minority and female owned businesses could be included. Using these sources would increase the availability index and result in lower disparity indices for minority and female owned business by the City of Cincinnati. For the purpose of developing policy in this area the City may wish to consider expanding upon this study to compare disparity indices when census and vendor list data is included in the availability analysis.

Notwithstanding, the data reviewed for this study did show under-utilization in some of the years of the study. The overall disparity index for minority and female firms in construction, for African Americans during FY 2000 is 0.35, suggesting significant under-utilization in the year the City operated its race neutral small business enterprise program. In FY 2000, Asian construction firms were not utilized at all, even though ready and available to do business with

the City. Hispanic construction firms were also significantly under utilized during FY 2000 with a disparity index of only 0.15. The only groups to experience over-utilization in construction for FY 2000 were Native American firms (DI of 1.21) and white female firms (DI of 1.64).

In supplies and services, Asian firms show a disparity index in FY 1999 of 0.34 and in FY 2000, 0.03, suggesting significant under-utilization in each of those years. For African American firms the disparity index for FY 1995 was 0.70 and for FY 2000, 0.86, again suggesting significant under-utilization in each of those years. For white female firms in this area, the disparity index suggests significant under-utilization in FY 1995 (0.31), FY 1996 (0.50), FY 1998 (0.47), and in FY 2000, (0.22), when the race neutral small business enterprise program was operating. Similarly, except for the extraordinary utilization of Native American firms in Program Years, FY 1995 (4.05) and FY 1996 (4.16), Native American firms were significantly under utilized in supplies and services in FY 1997 (0.01), FY 1998 (0.00), FY 1999 (0.39) and FY 2000 (0.14).

In addition to the quantitative statistical analysis, this study includes substantial qualitative evidence showing a perception of discrimination by the City of Cincinnati in its procurement and contracting practices with minority and female-owned firms. This evidence is provided through anecdotal interviews, public hearing testimony taken under oath, and interviews with employees of the City of Cincinnati regarding purchasing policies, practices and procedures. Taken together, the quantitative analysis and the qualitative evidence suggest the need for tailoring remedial responses to eliminate practices that may be discriminatory or that give rise to the perception of discrimination by the City of Cincinnati.

It is noteworthy that during the course of the study, the Griffin & Strong research team identified a number of important attributes that would give rise to opportunities for small, minority and female owned businesses. There are a number of strong business advocacy organizations, along with a network of service providers such as business incubators, loan funds, small business investment corporations and other business services available to entrepreneurs who may wish to do business with the City of Cincinnati. These are assets that provide an infrastructure that surpasses many comparable cities in the development and growth of small, minority and female entrepreneurs and enhance the City's ability to increase availability and

improve utilization of such firms. However, based upon current trends, these assets may not be enough to bridge the gaps unless they are bolstered with other measures.

Notwithstanding the level of statistical disparity or the quality of the anecdotal evidence that was produced during the study process, a race and gender conscious program under the current legal environment brings uncertainty and must be carefully considered. In this area we have conflicting opinions from the Federal District Courts and very few U.S. Court of Appeal opinions that provide support for the use of race and gender conscious programs. The United States Supreme Court has not rendered a decision in this area for more than six (6) years. Nevertheless, this study was conducted in strict accordance with the guidelines developed from relevant court decisions and provides a foundation for the creation of policies, legislation and procedures to address the disparities that have been identified and reverse the trends towards under utilization of minority and female owned businesses that is emerging. This study could reasonably support the adoption of strong nondiscrimination measures in solicitations, payment, standards, etc., for firms doing business with the City of Cincinnati, and, formal procedures for resolving complaints, imposing sanctions and other remedies for firms which violate these policies.”

GRIFFIN & STRONG, P.C.

DISPARITY STUDY FOR THE CITY OF CINCINNATI

GLOSSARY OF TERMS

1. **Minority Business Enterprise** - According to the Cincinnati Municipal Code, § 323-1-M, a sole proprietorship or joint venture, which is totally independently owned and controlled by a person or persons who are minority group members. If the entity is a partnership, corporation, or nonprofit organization, it must be at least 51% independently owned and controlled by minority group members.
2. **Minority Group Members** - According to the Cincinnati Municipal Code, § 323-1-M1, persons who are citizens of the U.S. who are African American, Hispanic, Asian or Native American.
3. **Women's Business Enterprise** - According to the Cincinnati Municipal Code, § 323-1-W, a sole proprietorship or joint venture that is totally independently owned and controlled by a woman. If the entity is a partnership, corporation, or nonprofit organization, it must be at least 51% independently owned and controlled by women.
4. **Small Business Enterprise** - According to the Cincinnati Municipal Code, § 323-1-S, a firm for which the gross revenues or number of employees averaged over the past three years do not exceed 25% of size standards of Section 3 of SBE Act for the City of Cincinnati.
5. **Availability** - The definition of this term derives from Justice O'Connor's statement in the Croson case, which defines availability as the number of qualified minority contractors who are capable of performing work for an entity. Courts have not resolved the issue of the best method in which to determine availability. Three methods have been described: (1) census data, stating the total number of minority firms in comparison to the total number of majority firms; (2) bidder analysis, evaluating the number of minority bidders in comparison to the number of majority bidders for a particular entity; and (3) bid analysis, reflecting the total number of bids submitted to an entity divided by the total number of bids submitted by minority firms.
6. **Utilization** - The number of minority and female-owned firms that are hired by governmental entities or their sub-contractors compared to the number of majority-owned firms that are used, or the total dollars spent with minority firms compared to the total dollars spent with majority firms.
7. **Disparity** - Term used to identify the statistical differences in numbers of available firms and the number of those firms that have been utilized by government contractors. The disparity is found when the number of available M/WBE firms are not utilized at a rate that is comparable to the number of majority-owned firms. A disparity, if found, can bring about a presumption of racial discrimination in that particular field.
8. **Relevant Market** - The geographic area in which "available" (as defined above) and qualified vendors, bidders, and contract awardees are situated. Since courts require that

statistical evidence of discrimination be provided within a specific geographic area, the relevant market for an entity is determined by ascertaining the location that meets one of the following criteria: (1) the area in which at least 85% of the qualified vendors are located; (2) the area in which at least 85% of the awardees are located; or (3) the area in which at least 85% of the bidders are located. When there is a difference in outcome upon applying the three methods, bidders are usually weighed more heavily, so that the relevant market becomes the geographical area in which a vast majority of the offerors and sellers to the relevant buying entity are located.

9. **Prime Contractor** - The firm that is named as the responsible party for the contract with the governmental entity.
10. **Sub-Contractor** - The firm that contracts with the Prime Contractor to assist in the work designated by the contract.
11. **Bidder** - Any firm that submits bids for city contracts and make offers to the governmental entity.
12. **Awardee** - The firm that successfully bids to the governmental entity and is awarded a contract.
13. **Vendor** - A firm that provides goods or services to governmental entities.
14. **Program Years** - The years in which a program was instituted in an effort to assist M/WBEs.
15. **Study Years** - The period of time that is the focus of the disparity study, and for which purchasing and contracting history are examined.
16. **Fiscal Year** - Business year as established by the governmental entity.
17. **Underutilization** - The determination made when a statistical comparison of contracts with majority-owned firms and M/WBE firms reflects that M/WBE firms have not received awards reflective of their availability.
18. **Disparity Index** - A means of measuring disparity defined as the ratio of the percentage of Minority and Female Business Enterprise Utilization divided by their percentage in the market place (or availability). If there is availability and no utilization, the corresponding disparity index is zero and suggests the existence of a disparity. In cases, where there is utilization, but no availability, the resultant disparity index is designated by the infinity symbol. A disparity index of one suggests that there is no disparity.
19. **Program** - Formal plan by a governmental entity, with features designed to enhance minority or female business enterprise utilization in that entity's contracting and procurement process.